

More than just Private Law?
The *Sui Generis* Crown-Māori Fiduciary Relationship in *Proprietors of Wakatū v Attorney-General*

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Introduction

On February the 6th 1840, te Tiriti o Waitangi (the Treaty of Waitangi) was signed between the British Crown and forty-three Māori chiefs at Waitangi.¹ Article 2 of the English version of the Treaty of Waitangi granted the Crown “the exclusive right of pre-emption” to purchase land from Māori.² This meant that direct pre-Treaty land purchases from Māori were deemed to be of no effect. The Land Claims Ordinance enacted a year later in 1841 established the Old Land Claims Commission. Its duty was to investigate if those purchases were made on “equitable terms”. If so, the land would first become Crown land cleared of native title, able to be granted to the buyer by the Governor.

Before these national events occurred, a lucrative sale of 20 million acres of land took place between the New Zealand Company and Māori chiefs of Ngāti Toa and Te Ātiawa on both side of the Cook Strait. The New Zealand Company promised to set aside a “portion of the land ceded by the Chiefs”³ equal to one-tenth as the true consideration provided in the purchases.⁴ The responsibility to reserve that land and the right to make further provision for their benefit was transferred from the Company to the Crown through an agreement in 1840.⁵

The investigation of the purchases was undertaken by Commissioner William Spain. His investigation of Te Tau Ihu (Nelson) found 151,000 acres to have been equitably acquired. An award granted that land to the Company but excluded one-tenths of the land “reserved for the natives” and occupation sites.⁶ Despite this recognition, the full amount of land promised to Te Tau Ihu Māori were never fully allocated.

These are the facts which prompted the Supreme Court in *Proprietors of Wakatū v Attorney-General* (*Wakatū*) to recognise for the first time in New Zealand that the Crown owed fiduciary duties in their dealings with Māori. Arguments supporting the Court’s fiduciary application implies that if the situation contains elements that would constitute any private person a fiduciary, it would be wrong to deny the remedy *despite* the identities of the actors.⁷ The ultimate question this dissertation aims to

¹ Jacinta Ruru “Asserting the Doctrine of Discovery in Aotearoa New Zealand: 1840s-1960s” in Robert J Miller et al *Discovering Indigenous Lands. The Doctrine of Discovery in the English Colonies* (Oxford University Press, Oxford, 2010) at 209 – 214. More signatures were acquired afterwards by Governor Hobson.

² Treaty of Waitangi (1840 art. 2) retrieved from <<http://www.treatyofwaitangi.maori.nz/>>

³ *Proprietors of Wakatū v Attorney-General* [2014] NZCA 628, [2015] 2 NZLR 298 at [2] (*Wakatū CA*).

⁴ *Proprietors of Wakatū v Attorney-General* [2017] NZSC 17 at [109] (*Wakatū SC*).

⁵ See *Ibid* at [111] for wording of Cl 13 1840 Agreement between Company and Imperial Government.

⁶ *Ibid* at [153].

⁷ See E W Thomas “The Treaty of Waitangi” NZLJ 277 at 279 “On the one hand, it would seem logical to hold that, as a fiduciary duty arises out of the circumstances attaching to a relationship requiring undivided loyalty,

answer is whether the fiduciary application in this area has evolved to become something that is applied *because* of the identity of the actors. In other words, has the Crown-Native fiduciary duty transcended an application of private law principles, and become something that goes further to characterise and define an important constitutional relationship? If so, what does that duty look like? And what are the implications? Part of this inquiry involves asking how the Canadian jurisprudence has developed in this manner, whether New Zealand has followed, and if it is inevitable and desirable that we follow the Canadian doctrine faithfully.

The use of the fiduciary principle preceding *Wakatū* involves a history of complex legal developments. The structure of this dissertation is ordered chronologically for the purpose of reflecting that history. In Chapter One, the foundational concepts of trust and fiduciary principles are clarified. These concepts later influence the application of fiduciary principles in the Crown-Indigenous context in Canada, and consequently New Zealand.

Chapter Two aims to present the ambiguities and paradoxes that exist in Canadian jurisprudence as a consequence of that application. The *Guerin*-duty has suffered ambiguous beginnings and an evolving recent past.⁸ These ambiguities involve defining the parameters of the duty's scope, basis, and content. Clarifying these ambiguities depends on first clarifying the meaning of the label *sui generis*. Then, the way the Courts have accommodated the *sui generis* fiduciary duty in the Crown context will be explored.

Chapter Three considers the application of the fiduciary label in the public context to define the relationship between Crown and Māori through the Treaty of Waitangi (The Treaty). The difference in legal force and source of the duty will be explored.

Chapter Four looks at the private framework adopted by the lower Courts in *Paki v Attorney-General (No 2) (Paki)* and *Wakatū* in their assessment of whether the Crown may owe fiduciary obligations to Māori. This chapter will also examine the reasoning which the Courts employed to prevent the duty arising and how it viewed *Guerin*'s relationship with orthodox fiduciary law.

good faith and trust, the duty should be imposed wherever the requisite circumstances are found to exist irrespective of the fact that one of the parties is the Crown. See also Kerensa Johnston, "Maori Legal Developments" (2015) NZ L Rev 171 at 178 "In legal terms, it should not matter that *Paki* is a case involving Māori and the Crown. The only consideration is whether fiduciary obligations are owed by one party to the other...".

⁸ See David W. Elliot, *Aboriginal Peoples in Canada and the United States and the Scope of the Special Fiduciary Relationship* (1996) 24 Man LJ 137 at 166. Elliot used this language to describe the development of the American Crown-Native fiduciary doctrine, however the language is also apposite to describe the development of the Canadian Crown-Native fiduciary doctrine.

Chapter Five outlines the approaches of the Supreme Court in finding the Crown owed and breached equitable obligations to Te Tau Ihi Māori. It compares looking at the factual situation through a purely private lens and the *sui generis* lens. It is argued that the *sui generis* lens is the most desirable framework to adopt. Lastly, it will be asked how the duty can be expanded upon based on the requirements which are accepted by the Supreme Court.

Chapter 1: Fiduciary Obligations in the Private Context

The application of the fiduciary principle in the Crown-Indigenous context has been a saga. *Wakatū* takes place within the context of debates in New Zealand and Canada about the proper scope and requirements of the Crown-Indigenous fiduciary relationship, and those debates in turn take place amidst uncertainty about the law of fiduciaries. What Hammond J described as the “substantial amount of legal baggage”⁹ that comes along with the employment of the fiduciary concept will be explored in this chapter. The fiduciary concept has been described as “one of the most-ill defined, if not altogether misleading terms in our law.”¹⁰ Therefore, it is imperative that the terminology, categories, characterisations, content and nature of the duty that eventually influence its application in the Indigenous sphere are clarified.

1. Terminology

The fiduciary concept arose from the law of trusts, a “highly developed, specialized branch of the law”,¹¹ which originated from the law of equity.¹² English equity is a body of laws which was developed conceptually separate alongside the common law in the English courts. It is premised upon notions of fairness, conscience, reason and flexibility.¹³ The term fiduciary has been employed in reference to a duty, or an obligation.¹⁴ A trust is a relationship, and the finding of a trust relationship results in the existence of fiduciary obligations. However, there is a difference between a true trust, a trust-like, and a fiduciary-like obligation.

The term fiduciary has also been used to describe a type of relationship,¹⁵ of which the archetypical fiduciary relationship is one of trustee and beneficiary.¹⁶ A trustee is a type of fiduciary but a fiduciary is not necessarily a trustee.¹⁷ A fiduciary relationship has been referred to as “trust-like”¹⁸ in the sense

⁹ *Paki v Attorney-General* [2009] NZCA 584, [2011] 1 NZLR 125 at [102] per Hammond J (*Paki CA*).

¹⁰ Finn, P.D *Fiduciary Obligations* (Lawbook Co, Sydney, 1977) at 1.

¹¹ *Guerin v. The Queen* [1984] 2 S.C.R. 335 386 per Dickson J.

¹² Butler, Andrew “Fiduciary Law” in Butler, Andrew (ed) *Equity and Trusts in New Zealand* (2nd ed, Brookers Ltd, Wellington, 2009) at 17.1.

¹³ Leonard I Rotman *Fiduciary Law* (Thompson Carswell, Ontario, 2005) at 154.

¹⁴ Underhill and Hayton *Law of Trusts and Trustees* (19th ed, LexisNexis 2010) at 1.52

¹⁵ Pearce, R, Stevens, J *The Law of Trusts and Equitable Obligations* (Oxford University Press, London 1995.) “Fiduciary Position of Trustees” 851.

¹⁶ Underhill, above n 14, at 1.52.

¹⁷ Rotman, L I, *Parallel Paths: Fiduciary Doctrine and the Crown-Native relationship in Canada* (Toronto, 1995) at 3.

¹⁸ *Ibid* at 103.

that a fiduciary relationship is essentially a relationship in which trust-like obligations are owed by the fiduciary even if the technical requirements to finding a trust are not satisfied.¹⁹

The third way the concept is used is through the label “fiduciary-like”.²⁰ It describes duties, or a relationship that is not fiduciary per se, but is analogous to the fiduciary duty. This third category was used by Cooke P in the seminal case *New Zealand Māori Council v Attorney-General (SOE Case)* to describe the partnership the Treaty created between Crown and Māori.²¹

2. Types of Fiduciary Relationships

There is a distinction between relationships of an inherently fiduciary kind (“inherent”)²², such as that between trustee and beneficiary, principal and agent, solicitor and client,²³ and relationships that are of fiduciary character because its particular aspects justify it being classified as such (“factual”).²⁴ Therefore, a relationship of an inherently fiduciary kind may involve duties which have no fiduciary element,²⁵ and the opposite situation may be observed where a relationship which does not generally give rise to fiduciary obligations may nevertheless have a fiduciary dimension.²⁶

3. Characterisation

One of fiduciary law’s most cherished attributes is its flexibility.²⁷ This flexibility and the wide range of relationships that the fiduciary concept potentially applies to means it has been difficult to fashion an appropriate and comprehensive list of requirements or characteristics.²⁸ Some have declared the

¹⁹ James Reynolds “The Spectre of Spectre: The Evolution of the Crown’s Fiduciary Obligation to Aboriginal Peoples Since *Delgamuukw*” in Morellato, Maria (ed) *Aboriginal Law Since Delgamuukw* (Cartwright Group, Ontario, 2009) at 136 See *Re West of England and South Wales District Bank, Ex Parte Dale and Coat* (1879) 11 ChD 772 at 778 per Fry J: “What is a fiduciary relationship? It is one in respect of which if a wrong arise, the same remedy exists against the wrong-doer on behalf of the principal as would exist against a trustee on behalf of the *cestui que trust*.”

²⁰ Language used by Damen Ward “Towards a duty of Active Protection: clarifying the Crown’s fiduciary and fiduciary-like obligations to Māori” (LLB(Hons) Dissertation, University of Otago, 1998).

²¹ *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (*The SOE Case*).

²² *Chirnside v Fay* [2006] NZSC 68 [2007] 1 NZLR 433 at [72].

²³ Pearce, R, Stevens, J above n 15, at 852.

²⁴ *Chirnside*, above n 20, at [75].

²⁵ *Ibid* at [72].

²⁶ *Ibid*.

²⁷ E W Thomas “An Affirmation of the Fiduciary Principle” [1996] NZLJ 405 at 405: “Its elasticity is to be perceived as a significant advantage.”

²⁸ See Laura Hoyano “The Flight to the Fiduciary Haven” in Peter Birks (ed) *Privacy and Loyalty* (Oxford University Press, Oxford, 1997) at 174: “I accept the need for a fiduciary principle, but the corollary is that it must not be so malleable as to become unrecognisable if advanced by the parties bearing its burden.”

task of trying to define the fiduciary relationship as a fool's errand.²⁹ Others have said to do so would be undesirable as it would circumvent the duty's role in performing an essential function of equity of "filling gaps in the law or improving the remedies available for breach of duty."³⁰

Different methodologies have been used to attempt to answer the question "when does a fiduciary relationship arise?" Some describe the relationship by listing out general characteristics that are observed in fiduciary relationships.³¹ According to Rotman, this is a "definition by description" approach,³² and does not actually engage in the task of providing a basis for its identification.

This dissertation does not undertake the task of deciding what should be the correct list of characteristics to decide when a fiduciary relationship arises. It only notes the ambiguities influence the application of the duty in the Crown-Indigenous context. Whatever characteristic is proposed, there will be an opposing comment arguing that it is not exhaustive for determining the existence of fiduciary relations. Some of these characteristics include the need for an undertaking,³³ control over property,³⁴ the existence of discretion involved with that control,³⁵ reasonable expectations of the parties,³⁶ the presence of the duty of loyalty³⁷ and vulnerability.³⁸

²⁹ Stephen Laing "Two Forms of the Fiduciary Relationship" (LLB(Hons) Dissertation, University of Otago, 2013) at 7.

³⁰ Thomas, above n 27, at 407: "A perfect definition would inhibit the Court's ability to apply the fiduciary principle so as to meet the needs and reasonable expectations of the community."

³¹ For example, in the Canadian case *Frame v Smith* [1987] 2 SCR 99 at [60], Wilson J observed the following characteristics seemed to be present in fiduciary relationships: The fiduciary has scope for the exercise of some discretion or power, the fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests, the beneficiary is particularly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

³² Rotman, above n 13, at 85.

³³ *Wakatū CA Ellen France J*, above n 3, at [118]. *Bristol and West Building Society v Mothew* [1998] Ch 1 at 18 per Millett LJ "A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence." Compare La Forest J in *M.(K.) v M.(H.)* [1992] 3 SCR 6 "fiduciary obligations are imposed in some situations even in the absence of any unilateral undertaking by the fiduciary."

³⁴ In *Wewaykum Indian Band v Canada* 2002 SCC 79 [2002] 4 SCR 245 (*Wewaykum*) at [85], Binnie J required an assumption of discretionary control over a cognizable Aboriginal interest. Compare Rotman above n 13 at 88. Rotman notes there are obvious exceptions to the property requirement as there are cases which concern the relationship between doctors and patients that do not involve the existence of property rights.

³⁵ Required by Dickson J, above n 11, at 384: "one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary."

³⁶ Gerald Lanning "The Crown-Māori Relationship: The Spectre of a Fiduciary Relationship" (1997) 8 AULR 445 at 458 at 485 citing Finn, "The Fiduciary Principle" in Youdan (ed), *Equity, Fiduciaries and Trusts* (1989) at 54 "A person will be a fiduciary in his relationship with another when and insofar as that other is entitled to expect that he will act in that other's or in their joint interest to the exclusion of his own several interest."

³⁷ *Wakatū CA* above n 3 per Ellen France J at [118] and Harrison and French JJ at [208].

³⁸ *Mabo v The State of Queensland (No 2)* (1992) 175 CLR 1 at [80], *Wakatū SC* Elias CJ, above n 4, at [391].

4. Content

The fiduciary principle has a situation-specific character.³⁹ It is accepted that the content of the relationship varies according to the context and the nature of the relationship.⁴⁰ However, it has also been described as “generic” as the same proscriptions can apply to all fiduciary relations.⁴¹

In trust law, the “irreducible core” refers to the obligation underlying the trust. This is the duty to act with honesty and good faith, without which there cannot be a trust.⁴² Similarly in fiduciary law, there has been references to an “irreducible core” by academics. Weinrib claims that the “established irreducible core of the fiduciary consists of the duty not to conflict with the fiduciary’s own interest (no-conflict rule), and the duty not to profit from their position (no-profit rule).”⁴³ Butler also affirms those duties to be “core duties” but adds two more to the list: the duty to avoid divided loyalties and the duty to report to the beneficiary that the duty has been breached.⁴⁴

Loyalty holds a status as the distinguishing obligation of the fiduciary relationship.⁴⁵ The no conflict rule and the no profit rule have also been held to belong to the umbrella duty of loyalty.⁴⁶ Another duty under its umbrella is the duty of good faith.⁴⁷ Even though “fiduciaries undoubtedly must act in good faith”⁴⁸ it has been argued that it should not be classed as a fiduciary duty as it is also a concept used in other areas of law.⁴⁹

³⁹ Rotman, above n 13, at 244.

⁴⁰ *Frame v Smith*, above n 29, at 135.

⁴¹ Robert Flannigan “The Boundaries of Fiduciary Accountability” [2004] NZ L Rev 215 at 222. He notes “it is therefore somewhat inaccurate to assert that fiduciary responsibility varies according to the nature of the relations involved. Yet that is a popular assertion.”

⁴² *Armitage v Nurse* [1998] Ch 241 (CA) at 253-254.

⁴³ Ernest J Weinrib “The Fiduciary Obligation” (1975) 25 UTLJ 1 at 16.

⁴⁴ Butler, above n 12, at 17.2.2.

⁴⁵ *Mothew v Bristol & West Building Society* above n 33, per Lord Millett quoted in *Wakatū CA* at [116] per Ellen France J and Harrison and French JJ at [208] footnote 191.

⁴⁶ Matthew Conaglen “The Nature and Function of Fiduciary Loyalty” (2005) 121 LQR 452 at 479 “The notion of loyalty in Anglo-Australian fiduciary doctrine is an umbrella concept. Fiduciary doctrine is not comprised merely of a single and simple duty to be loyal. Rather, the fiduciary doctrine comprises several doctrines, such as they prohibition of fiduciaries acting where there is a conflict of between duty and interest, and it is those doctrines that constitute the concept of fiduciary loyalty.”

⁴⁷ Hoyano, above n 28, at 179. Hoyano claims the duty of good faith and avoidance of a conflict of duty and self-interest are compendiously described as the duty of loyalty.

⁴⁸ Conaglen, above n 46, at 456 relying on *Mothew* above n 33 at 18

⁴⁹ *Ibid.*

5. Prescriptive v Proscriptive

There is debate about whether the fiduciary duty's nature is prescriptive or proscriptive. Prescriptive means positive or active, while proscriptive is passive or reactive.⁵⁰ Finn describes the prescriptive duty as being concerned with whether the beneficiary's interests are in fact being served by the fiduciary and uses the possible effects on those interests as the determinant in settling the fiduciary's responsibilities. On the other hand, the proscriptive view is concerned with the maintenance to the fidelity of the beneficiary and is only activated when the fiduciary seeks to act improperly.⁵¹ Finn sees fiduciary duties as merely proscriptive in nature,⁵² while others like Rotman see fiduciary duties as positive in nature.⁵³ The proscriptive-prescriptive dichotomy of the duty is relevant when discussing situations of conflicting interests of the Crown in the Indigenous context.

⁵⁰ Rotman, above n 13, at 310.

⁵¹ Finn, above n 36, at 25. There is jurisprudential support for this. See *Breen v Williams* (1996), 186 C.L.R. 71 HCA at 113 "Australian courts only recognise proscriptive fiduciary duties[...] the law of this country does not otherwise impose positive legal duties on the fiduciary to act in the interests of the person to whom the duty is owed."

⁵² *Ibid* at 28.

⁵³ Donovan WM Waters "Development of Fiduciary Obligations" R Johnston and JP McEvoy Gerard C *La Forest at the Supreme Court of Canada, 1985-1997* (Winnipeg: University of Manitoba Canadian Legal History Project, 2000) at 134: "The duties of fiduciaries to act in the best interests of their beneficiaries, as opposed to the usual duty of the fiduciary to refrain from acting in self interest, introduces positive obligations, and these are likely to be significantly more extensive than simply honouring the duty to be actually and transparently loyal."

Chapter 2: The Evolution of the Crown-Indigenous Fiduciary Doctrine in Canada

The Canadian Supreme Court decision *Guerin v The Queen*⁵⁴ holds its status as a watershed decision because it was the first time a Commonwealth Court held that obligations of a private law nature could be enforced within the relationship between the Crown and Indigenous peoples. Before *Guerin*, the relationship was characterised as a political trust. Some academics interpret *Guerin* as having recognised a general fiduciary duty between Crown and all Indigenous peoples of Canada covering every facet of the relationship.⁵⁵ In contrast, New Zealand judges have relied on subsequent case law expressly limiting the scope of the duty to deny that a fiduciary relationship “at large” can exist.⁵⁶ This chapter aims to solve the confusion by first clarifying the true basis of the Crown’s obligations. It will then explain the *sui generis* characterisation and the effect this has on the content of the duty.

1. Background and Significance of the Political Trust

In Canada, Indigenous land may be surrendered to the Crown to be held as reserves. This is governed by the Indian Act,⁵⁷ which provides that “reserve lands shall be held by Her Majesty for the use and benefit of the respective bands for which they were set apart”.⁵⁸ In the 1950s, the Musqueam Indian Band surrendered valuable surplus reserve lands to the Crown for lease to a golf club on certain specified terms. The golf club refused to enter into a lease on the approved terms, and the terms obtained by the Crown ended up being much less favourable than what the Band had approved of.⁵⁹ The band was not informed of the amendments and only received information of the lease terms twelve years later. It was held that the Crown’s duty when faced with the unfavourable lease was to go back to the Band and consult with it.⁶⁰ By “barrelling ahead” with the lease, the Crown breached its fiduciary obligations.

In finding the existence of a fiduciary relationship between the Band and the Crown, *Guerin* rejected the position previously held by the Commonwealth that the Crown’s dealings with Indigenous groups were merely political and judicially unenforceable.⁶¹ This was embodied through the concept of the

⁵⁴ Above n 11.

⁵⁵ Rotman, above n 17, at 3.

⁵⁶ *Paki v Attorney-General* [2009] 1 NZLR 72 (*Paki HC*) per Harrison J at [116] and [141] and *Proprietors of Wakatu v Attorney-General* [2012] NZHC 1461 (*Wakatū HC*) at [282] Clifford J used the language “general fiduciary duty” while Harrison J said the fiduciary duty does not “exist at large”.

⁵⁷ Indian Act R.S.C 1952.

⁵⁸ Indian Act R.S.C 1952 s 18(1).

⁵⁹ *Guerin*, above n 11, at 335.

⁶⁰ *Ibid.*

⁶¹ Bookman, Miriam “A Legal Backstop for Historical Māori Grievances: *Proprietors of Wakatū v Attorney-General*” (2017) 23 AULR 348 at 349 discussing *Tito v Waddell* [No 2] [1977] Ch 106, 222. In *Tito v Waddell*, Indigenous Banaban Islanders entered into arrangements with a British mining company for mining royalties to

political trust. It saw dealings of the Crown as a “sacred political obligation, in the execution of which the state must be free from judicial control.”⁶²

The Court did not illegitimise the concept of a political trust. It distinguished the political trust cases by factually differentiating the basis of the interest involved. Political trust decisions concerned the distribution of public funds which depended entirely on a statute, ordinance, or treaty as the basis for its claim to an interest. Here, the interest was an independent legal interest. Thus, by circumventing the political trust presumption, *Guerin* recognised that the political trust did not exhaust the potential legal character of the multitude of relationships between the Crown and Aboriginals.⁶³

2. The Approaches

After overcoming the notion of a political trust, the Court enforced legally binding obligations on the Crown through two approaches. Dickson J found the basis of the relationship as having roots in the concept of native title, and the surrender requirement in s 18(1) Indian Act,⁶⁴ which had the specific hallmark of discretionary power.⁶⁵ The relationship was characterised emphatically as *sui generis* by Dickson J in two contexts. One context was in relation to the unique character both of the Indians’ interest in land and of their historical relationship with the Crown⁶⁶, and the other was solely in relation to the unique nature of the legal interest in land. Thus, the duty was not a public one, nor a purely private one. Rather, it was “in the nature of a private law duty.”⁶⁷

While Dickson J applied trust-like principles, Wilson J applied both trust-like *and* trust principles. The starting point for Wilson J was also the fiduciary principle. The basis of this obligation is rooted in Aboriginal title, the same pre-requisite which created the trust relationship for Dickson J. However, the s 18 surrender requirement, which was the essential ingredient for Dickson J to constitute a

be paid into “the Banaban fund which was to be used partially “for the benefit of the existing Banaban community”.

⁶² *St Catherine’s Milling and Lumber Co. v The Queen* (1887) 13. SCR 577. One explanation of the basis for the doctrine is the constitutional feature of separation of powers. See Stephen Gray “Holding the Government to Account: The ‘Stolen Wages’ Issue, Fiduciary Duty and Trust Law” [2008] MULR 115 at 145. Another explanation is the “peculiarly English attitude of deference to authority see Paul Finn ‘The Forgotten “Trust”’: The People and the State” Malcolm Cope (ed), *Equity: Issues and Trends* (1995) 131 at 140.

⁶³ *Wewaykum*, above n 34, at [74].

⁶⁴ *Guerin*, Above n 11, at 376 “The fiduciary relationship between the Crown and the Indians has its roots in the concept of Aboriginal, Native or Indian title. The fact that Indian bands have a certain interest in lands does not, however, in itself give rise to a fiduciary relationship between the Indians and the Crown. The conclusion that the Crown is a fiduciary depends upon the further proposition that the Indian interest in land is inalienable except upon surrender to the Crown”.

⁶⁵ *Ibid* at 350.

⁶⁶ *Ibid* at 387.

⁶⁷ *Ibid* at 385.

fiduciary relationship, was seen as an acknowledgement of the historic reality of the Crown undertaking to protect the Indian Band's beneficial interest.⁶⁸ This approach acknowledges that the fiduciary obligation existed long before surrender under the Indian Act.

This starting point of a fiduciary duty *crystallized* upon the surrender into an express trust of specific land for a specific purpose."⁶⁹ While Wilson J found the surrender requirement to create a trust relationship, Dickson J found the surrender requirement to be the "key ingredient" for the existence of the fiduciary obligation.

⁶⁸ Ibid at 349.

⁶⁹ Ibid at 355.

3. *Sui generis*

In order to understand the true nature of the *Guerin* fiduciary relationship, its characterisation as *sui generis* needs to be explored. *Sui generis* means unique, or of its own kind. This characterisation tells us nothing about the content of the duty but has great potential to inform if there are special rules that apply to its content.

Due to the context-specific nature of analysing fiduciary duties, it can be argued that all fiduciary relationships are *sui generis*.⁷⁰ It has been emphasised many times that not all fiduciary relationships and not all fiduciary obligations are the same as they are all shaped by the demands of the situation.⁷¹ Therefore, Reynolds comments that the Crown-Indigenous fiduciary relationship may be *sui generis*, but so are other fiduciary relationships:⁷²

It is difficult to understand why the relationship between Crown and Aboriginal peoples is any more in a class of its own than that between doctor and patient, director and company, parent and child, or lawyer and client.

The question is whether Dickson J was going *beyond* established categories and creating a class *in addition* to the two established categories of inherent and factual. Such an approach would view the Crown-Native relationship as *so* special, and *so* unique, that it deserves, as the term suggests, a class of its own. This is significant as an entirely new legal category of status-based fiduciary obligation may warrant an exception from general equitable principles or demand a new understanding of what those principles mean. Hammond J's interpretation of the term supports this as he saw it to mean "it depends on its own principles and is enforceable as such."⁷³

Therefore, Dickson J's approach begs the question of whether the relationship between Crown and Native is *so* unique, and *so* different to any other course of dealings as to warrant its own class? What the examples given by Reynolds lack, is an example whereby two groups, whether doctors and patients, lawyers and solicitors, principals and agents, share a specific course of historical dealings. Though the dealings between Musqueam Indian Band and Crown related to a particular transaction, it took place against the background of wider historical dealings between the British Crown and Indigenous peoples of Canada. Similarly, the dealings between Te Tau Ihu Māori, the New Zealand Company and the Crown were in relation to a specific dealing. However the backdrop of the Treaty of

⁷⁰ Reynolds, above n 19, at 139.

⁷¹ *McInerney v McDonald* [1992] 2 SCR 138 at [149] cited in *Wewaykum*, above n 32, at [92].

⁷² Above n 19, at 139.

⁷³ *Paki CA*, above n 9, at [105].

Waitangi, and promises to protect customary property rights through land charters⁷⁴ cannot be taken out of the equation.

The special nature of native title was important to the Judges in *Guerin*.⁷⁵ It was also described as *sui generis*.⁷⁶ The label reflects the attempt to reconcile the fact that customary rights do not stem from the same philosophies that underlie common law property interests.⁷⁷ *Attorney-General v Calder* was relied upon in *Guerin* to affirm that Aboriginal land rights were inherent, did not depend upon prior recognition or affirmation by the Crown, and did not need to correspond with traditional common law conceptions of property rights to receive the common law protection.⁷⁸ Full property interests according to Māori customs were also recognised in New Zealand law in *Ngati Apa v Attorney-General*.⁷⁹

However, this interest by itself was not enough to impose a fiduciary obligation.⁸⁰ Instead, the emphasis on surrender and the government's actions illustrate that the unique history in *dealing* with this *sui generis* interest is the important element which makes the relationship unique. This unique history has been emphasised many times in case law.⁸¹ Fiduciary relationships are generally concerned with what is going on in the *present*. For example, this doctor *is* caring for this patient, these people *are* in a joint venture. But perhaps the historical facts create a continuing obligation in the future that push the relationship into a *sui generis* category.⁸²

Reynolds proposes that instead of invoking the manta of *sui generis*, “it would be more profitable for the courts to explain why the rules that are common to fiduciary relationships generally should not apply to this particular fiduciary relationship.” The *sui generis* label should not be revoked, rather, more expansion is needed on what the *sui generis* label means.

⁷⁴ 1840 Charter of Instructions to Governor Hobson see *Wakatū SC* above n 4 at [17]

⁷⁵ *Guerin*, Above n 11, at 376 per Dickson J and 349 per Wilson J.

⁷⁶ *Ibid* at 382.

⁷⁷ John Burrows and Leonard Rotman “The Sui Generis Nature of Aboriginal Rights: Does it Make a Difference” (1997) 36 *Alta. L Rev* at 11.

⁷⁸ *Calder et al. v Attorney-General of British Columbia* (1973) 34 *DLR* (3d) 145 (SC) mentioned in *Guerin* above n 11, at 336.

⁷⁹ *Ngati Apa v Attorney-General* [2003] 3 *NZLR* 643 (CA).

⁸⁰ *Guerin*, above n 11, at 376.

⁸¹ *Alberta v. Elder Advocates of Alberta Society* 2011 SCC 24 [2011] 2 *S.C.R.* 26 at [40], *R v Sparrow* [1990] 1 *S.C.R.* 1075 at 1107, *Wewaykum*, above n 34 at [80].

⁸² Thank you to Jared Papps for this suggestion.

4. Basis and Scope

The most perplexing questions in *Guerin*'s wake involved determining what the actual scope and basis of the relationship was. *R v Sparrow* expanded the Crown-Indigenous fiduciary relationship through a different method of application than *Guerin*. The primary issue in *Sparrow* involved interpreting the nature and scope of fishing rights as "existing Aboriginal rights" held under s35(1) Constitution Act 1982 as being "recognized and affirmed." The interpretation of was done in light of the fact that:⁸³

the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The *relationship between the Government and aboriginals is trust-like*, rather than adversarial, and contemporary recognition and affirmation of Aboriginal rights must be defined in light of this historic relationship. (emphasis added)

Thus, the fiduciary relationship from *Guerin* was not interpreted to be only between Crown and Musqueam Band but also between Crown and all Indigenous peoples of Canada.

The factual situations the fiduciary relationship applied to was also expanded. As noted by William Young J in *Paki*, *Guerin*'s categorization of the underlying relationship as fiduciary is "very orthodox", since the statutory scheme involved trust-like characteristics.⁸⁴ However, after *Guerin*, applications of the duty have been applied to situations beyond instances of surrender, such as the expropriation of existing reserves⁸⁵ and the facts of *Wewaykum Indian Band v Canada (Wewaykum)*⁸⁶ which involved the process of reserve creation on lands which had no traditional native title interest.

In the 19th century, the Laich-kwil-tach First Nation had displaced the Comox First Nation on north-eastern Vancouver Island. Facing competition for the land from non-Indian settlers, the government intervened and allocated reserves for the Indians. Two bands Wewaykum and Wewaikai were part of the Laich-kwil-tach First Nation. Wewaikai's name was listed opposite several reserves on the government reserve schedules. This was done by writing the band's name and ditto marks under the reserves which they occupied. Wewaikai was listed to hold both Reserve 11 and 12, but the Wewaykum band had also been settling on Reserve 11. The two bands got into a fishing dispute but

⁸³ Above n 73, at 1108.

⁸⁴ *Paki v Attorney-General (No 2)* [2014] NZSC 118, [2015] 1 NZLR 67 (*Paki SC*) at [273].

⁸⁵ *Osoyoos Indian Band v Oliver (Town)* [2001] 3 S.C.R. The question before the Supreme Court of Canada involved whether a strip of land located on a reserve remained part of the reserve after a federal Order in Council consented to the taking of the land by the province. Iacobucci J at [52] held "the fiduciary view of the Crown is not restricted to instances of surrender."

⁸⁶ Above n 34.

agreed on a resolution to cede possession of Reserve 11 from Wewaikai to Wewaykum. However, a “ditto mark error” occurred. The clerk inserted Wewaykum’s name opposite Reserve 11 on the records but did not remove ditto marks opposite Reserve 12. This made it look like Wewaykum had an interest in both Reserve 11 *and* Reserve 12, wrongfully displacing the Wewaikai band of Reserve 12. What ensued was both bands suing each other for entitlements to each other’s reserves, and both suing the Crown for failing to protect an administrative allocation of land and preventing the other Band from settling on that land.

The judgment has both a broadening function and a limiting function. Its broadening function affirms that fiduciary duties may arise more generally than situations involving aboriginal title and the Crown’s right of pre-emption.⁸⁷ Importantly, it was held that the surrender requirement was focused on by Dickson J only because those happened to be the facts of the *Guerin* case.⁸⁸ It was also implied that the fiduciary duty owed by the Crown to Aboriginal peoples was not restricted to instances where the facts raise “considerations in the nature of private law duty.”⁸⁹ Despite these important expansions of the factual basis, the case is better known for its limitation function. Binnie J famously declared “there are limits” to the Crown-Aboriginal relationship. He noted the “flood” of fiduciary duty claims across a whole spectrum of complaints ranging from requiring the provision of social services to covering moving expenses. It was not a source of plenary liability.^{89.1}

Binnie J’s limitations were influenced by the Canadian Supreme Court case *LAC Minerals v International Corona Resources Ltd* where the Court held not all obligations existing between the parties to a fiduciary relationship are themselves fiduciary in nature,⁹⁰ those that were fulfilled his requirements. In doing so, his Honour applied a well-accepted feature of the fiduciary relationship onto the Crown-Indigenous relationship and formulated requirements which determined when those obligations were fiduciary in nature. This test held that fiduciary dealings only arose when there was a “cognizable Indian interest” and assumption of control by the Crown over that interest.⁹¹

By narrowing the scope of the relationship, Binnie J actually confirmed the broader *sui generis* relationship existing in the first place. His Honour referred to the historic powers and assumptions assumed by the Crown over Indian rights as being of broader importance, and the duty’s need to facilitate supervision of the high degree of discretionary control “gradually assumed by Crown over the lives of Aboriginal peoples.”⁹² The relationship can be seen broadly as being between Crown and

⁸⁷ Ibid at [98].

⁸⁸ Ibid at [98].

⁸⁹ Ibid at [74] also cited in *Elder Advocates*, above n 81, at [40] per McLachlin CJ.

^{89.1} Ibid at [80]-[81].

⁹⁰ Ibid citing *LAC Minerals Ltd v International Corona Resources Ltd* [1989] 2 SCR 574.

⁹¹ Ibid at [83].

⁹² Ibid at [79].

Indians, but specifically, the requirements give rise to an obligation in the immediate relationship. Thus, the *sui generis* fiduciary relationship's unique character may be that it is both general and specific. As indicated above, it is a characteristic of all Crown-Indigenous interactions that there are specific interactions with certain groups, as well as historical underpinnings between the wider identity of those groups. Therefore, it is general in the creation, or the basis of the relationship, and specific in the immediate application of the fiduciary doctrine.

If the relationship between the Indigenous peoples and the Crown, "viewed generally, is fiduciary in nature, but not all dealings between parties in a fiduciary relationship are governed by fiduciary obligations"⁹³, what then, is the utility in having a general relationship? More broadly, what is the utility of having inherent and factual fiduciary relationships when everything will end up depending on the specific context?⁹⁴

Flannigan suggests it is unhelpful to use the terminology "relationship" in the fiduciary context. He claims that there are no fiduciary "relationships" as such- there are only "nominate idiosyncratic arrangements that attract fiduciary obligations". Fiduciary responsibility is only a dimension of a relationship but it is not *the* relationship, as fiduciary accountability only imposes a singular obligation to act in a certain way in the *context* of a relationship.⁹⁵ On the other hand, Rotman claims the focus on relationships rather than individuals is supported by an analysis of the history and underlying purpose of fiduciary law. The fiduciary concept's emphasis on selfless behaviour, utmost good faith and conscience serve to distinguish it from other spheres of private law. ⁹⁶ It goes further than simply regulating the bilateral relationship between two legal subjects and focuses on broader community interests. Therefore, a focus on relationships is necessary to maintaining the integrity of important social and economic interactions of high trust and confidence.⁹⁷

This dissertation does not aim to answer the question of why relationships are a necessary theme in fiduciary law.⁹⁸ It only comments that if fiduciary relationships are accepted to exist, it is apt to describe the Crown-Indigenous relationship as one since they actually have a history of particular dealings. Seeing the Crown as a party not only having a fiduciary obligation to Indigenous peoples in the immediate instance, but also generally has a characterisation function that can play an important

⁹³ *Manitoba Metis Federation v Canada (Attorney-General)* 2013 SCC 14, [2013] 1 SCR 623 at [48].

⁹⁴ also laid down in *New Zealand Netherlands Society "Oranje" Inc v Kuys* [1973] 2 NZLR 163 (PC) at 680: "person may be in a fiduciary position quoad part of his activities and not quoad other parts."

⁹⁵ Flannigan, above n 39, at 228.

⁹⁶ Leonard Rotman "Understanding Fiduciary Duties and Relationship Fiduciarity" (2017) 62 McGill L J 975 at 1030.

⁹⁷ *Ibid* at 1031.

⁹⁸ See James Edelman "The Role of Status in the Law of Obligations: Common Callings, Implied Terms and Lessons for Fiduciary Duties" (paper presented to the Conference on the philosophical foundations of fiduciary law, DePaul University, 19 July 2013).

part of the background material by informing the duties which are undertaken in the immediate instance.⁹⁹ This will be expanded on in the final chapter.

5. Content

By solidifying the basis of this underlying relationship and the requirements that give rise to obligations within it, the Court was also able to clarify the important task of what the content of the immediate duty looked like. The content varies according to the nature and importance of the interest. Land was considered the most pivotal interest in Indigenous economies and cultures,¹⁰⁰ which means land rights will attract equitable duties.

There are, however, different types of land rights. It is significant that *Wewaykum* did not involve the Crown acting as a third party in the disposition of existing Indian interests -it was involved in the creation of a new interest in land which the Indians had no pre-existing right.¹⁰¹ In the pre-reserve stage, it was exercising a governmental function. Nevertheless, fiduciary obligations were not completely excluded. The Crown was still held to “basic obligations” of loyalty and good faith.¹⁰² After the reserve has been created, which meant a legal interest has been created, the duty expanded to include the protection and preservation of the band’s quasi proprietary-interest in the reserve from exploitation.¹⁰³

It remains unclear whether non-land rights like fishing rights, or forestry rights would give rise to a fiduciary obligation as all recognition of fiduciary protection has been in relation to reserve lands. *Sparrow* concerned fishing rights, but that litigation was assessed within the framework of s 35 Constitution Act. Binnie J recognised this,¹⁰⁴ but this does not preclude non-land rights from being able to give rise to fiduciary obligations as his test expressly allowed for different types of Indigenous interests.

Most importantly, the Court’s reference to loyalty and good faith as basic obligations in the pre-reserve interest stage implies the *sui generis* relationship is not precluded from the application of the common principles of strict fiduciary law. Basic standards of loyalty and good faith can still apply to the Crown in its exercise of a public function and the meaning of those basic standards are adapted to co-exist with those functions. The subsequent case *Haida Nation v British Columbia* affirmed this.

⁹⁹ Ibid at 21.

¹⁰⁰ *Wewaykum*, above n 34, at [81]

¹⁰¹ Ibid at [91].

¹⁰² Ibid at [94].

¹⁰³ Ibid at [98].

¹⁰⁴ Ibid at [81].

Noting *Wewaykum*, the Court stated “the content of the fiduciary duty may vary to take into account the Crown’s other, broader obligations”¹⁰⁵ and still required the Crown to act with reference to the “Aboriginal group’s best interest in exercising discretionary control over the specific Aboriginal interest at stake.”¹⁰⁶

Binnie J noted the Crown’s unique role as fiduciary by stating that “the Crown is no ordinary fiduciary. It wears many hats and balances many interests some of which cannot help but be conflicting.”¹⁰⁷ In the reserve creation stage, the Crown regarded the interests of settlers as well as Indians. After reserve creation, the Crown may still be balancing interests of competing bands. Still, the Crown cannot shirk its duty by invoking competing interests. The role of honest referee did not exhaust the Crown’s fiduciary obligation and it was still obliged to preserve and protect each band’s interest in the reserve.¹⁰⁸

The Court accommodated the meaning of loyalty to the circumstances. It was acknowledged there are competing interests to weigh up in the Crown’s governmental responsibilities, however the Crown may still be “loyal” while having divided interests. The critical fact is that intervention of the Crown was positive. Because there was a particular arrangement in place, the Crown just needed to be loyal to the extent of discharging its mandate. This warrants a change in the traditional view that the duty of loyalty would necessarily mean avoiding divided loyalties absolutely. The Crown, with those competing interests in mind, may still act with ordinary prudence to the best interests of the Indigenous beneficiaries, and provide full disclosure appropriate to the subject matter.¹⁰⁹ This “soft version” of loyalty¹¹⁰ holds the Crown to a lower standard of conduct depending on the interest involved.

¹⁰⁵ *Haida Nation v British Columbia* (Minister of Forests) [2004] 3 R.C.S at 523.

¹⁰⁶ *Ibid* at [83].

¹⁰⁷ *Wewaykum*, above n 34, at [96].

¹⁰⁸ *Ibid* at [104]. This is also consistent with orthodox case law. In *Mothew* above n 33 at 19, Millett LJ found “the fact that [the fiduciary] cannot fulfil his obligations to one principal without being in breach of his obligations to the other will not absolve him from liability.”

¹⁰⁹ *Wewaykum*, above n 34, at [93].

¹¹⁰ Language used by Lindsay Breach in “Fiducia in Public Law” (2017) 48 VUWLR 413 at 438.

Conclusion

In Canada, “the notion that the Crown has legally binding obligations towards Aboriginal peoples in Canada is indisputable”.¹¹¹ Within this relationship, only some dealings are fiduciary in nature. However, those dealings have gone beyond trust-like situations involving pre-existing legal interests. In those situations, the *sui generis* duty has refashioned itself to better accommodate the role of the Crown.

¹¹¹ John Burrows and Leonard Rotman *Aboriginal Legal Issues: Cases, Materials and Commentary* (2nd ed, LexisNexis, Ontario, 2003) at 437.

Chapter 3: The Crown-Māori “Fiduciary-Like” Relationship

Despite Canada and New Zealand sharing a common law foundation and similar history of European colonisation, the *Wakatū* judgment is the first New Zealand judgment to recognise a fiduciary duty owed by Crown to Māori thirty three years after *Guerin*.¹¹² This chapter looks at what could explain that delay. It examines how the application of the fiduciary label evolved around the Treaty of Waitangi, and how this serves as a contrast to the *sui generis* duty. First, an overview will be given of the developments. Then the differences in legal application of the fiduciary concept will be explored, highlighting a difference in legal force and legal source of the duty.

1. Overview of developments

Fiduciary obligations are said to be private in character.¹¹³ There are different interpretations of the word private.¹¹⁴ William Young J suggests that fiduciary obligations apply primarily between “private individuals”. This differs from the “obligations of the Crown in its dealings with Māori as the Indigenous people of New Zealand and in particular as a Treaty partner.”¹¹⁵ The early use of the fiduciary label in the post-*Guerin* pre-*Wakatū* era was invoked solely to determine obligations of the latter category.

The first case to consider the meaning of those obligations was the *SOE* case.¹¹⁶ The Court of Appeal was tasked with deciphering the meaning of the “principles of the Treaty of Waitangi” as incorporated into the State-Owned Enterprises Act 1986.¹¹⁷ Undertaking the task of interpreting Treaty principles, the Court emphasised the notion of partnership between Crown and Māori.¹¹⁸ The Court also held that the relationship between the Treaty partners created responsibilities that are “*analogous* to fiduciary duties”. The duty is not merely passive but extended to the “active protection of Māori people in the use of their lands and waters to the fullest extent practicable.”¹¹⁹ This is a prescriptive conception of the fiduciary duty.

¹¹² Bookman, above n 61, at 350.

¹¹³ *Wakatū CA*, above n 3, at [24] per Ellen France J.

¹¹⁴ Other contexts where the concept “private” has been used has been in relation to the type of interest the Crown is dealing with. See *Guerin* above n 11 at 385. It has also been mentioned in relation to the concept of legal enforceability. See Kendall Luskie “The Relationship between the New Zealand Crown and Māori: A Future for Fiduciary Obligations? (LLB(Hons) Dissertation, University of Otago, 2010) at 3.

¹¹⁵ *Paki SC*, above n 84, at [259] per William Young J.

¹¹⁶ Above n 21.

¹¹⁷ State-Owned Enterprises Act 1986, s 9.

¹¹⁸ Above n 21, at 664.

¹¹⁹ *Ibid*.

While Cooke P writing for the Court in the *SOE case* did not cite *Guerin*, his Honour's subsequent obiter comments did. They invite the deduction that he welcomed a Crown-Māori duty existing independently of the Treaty. In *Te Rununga o Muriwhenua Inc v Attorney-General (Muriwhenua)*, the fiduciary-like analogy drawn in the *Lands case* was seen as consistent with such case law.¹²⁰ Subsequently, in *Muriwhenua's* sequel, *Te Rununga o Wharekauri Rekohu Inc v Attorney-General (Wharekauri)*, Cooke P indicated that the Treaty of Waitangi supports the existence of the fiduciary duty.¹²¹ In *Te Runangnui o Te Ika Whenua Inc Society v Attorney-General (Te Ika)*, his Honour noted that extinguishment of Māori property rights by "less than fair conduct or on less than fair terms" was "likely to be a breach of the fiduciary duty widely and increasingly recognised as falling on the colonizing power."¹²² Rather than being the source of the duty, the Treaty of Waitangi would support it.

The 2007 case *New Zealand Māori Council v Attorney-General (Forests case)*¹²³ did not follow Cooke P's hint of an independent duty. Instead, the Gendall J suggested that:¹²⁴

The *Lands case* has made it clear beyond any possible doubt that the instrument, the Treaty, created fiduciary duties on the Crown in favour of a specific class of people, Maori, and they, as partners with the Crown, have corresponding duties of good faith.

O'Regan J's response in the Court of Appeal (on behalf of William Young and Robertson JJ) mirrored the way Gendall J advanced the duty; since the duty "was created" by the Treaty of Waitangi, the Court simply had to reinforce the original stipulation that fiduciary law's relationship with the Treaty was a guide by analogy only.¹²⁵ There could be no fiduciary duty "in a private law sense" as the Crown may find itself in a position where its duty to one Māori claimant group conflicts with its duty to another.¹²⁶

¹²⁰ *Te Rununga o Muriwhenua Inc v Attorney-General* [1990] NZLR 641 (CA) at 655 (*Muriwhenua*).

¹²¹ *Te Rununga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301 (CA) at 306 (*Wharekauri*).

¹²² *Te Runangnui o Te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 21 (CA) (*Te Ika*) at 24.

¹²³ *New Zealand Māori Council v Attorney-General* HC Wellington, CIV-2007-485-95, 4 May 2007 (*Forests HC*). The Maori Council sought to prevent the Crown from transferring a portion of "Settlement Licensed Land" to Te Arawa from a historical Treaty settlement. The transfer was alleged to be a breach of a settlement reached with the appellants that provided the Crown would retain its freehold interest in the land and only sell forestry rights until the Waitangi Tribunal had determined the Māori interests in land. The appellants represented Maori interests and claimed the Crown acted in breach of its fiduciary duty towards the appellants.

¹²⁴ *Ibid* at [64].

¹²⁵ *New Zealand Māori Council v Attorney-General* [2008] 1 NZLR 318 (CA) (*Forests CA*) at [81].

¹²⁶ *Ibid*.

2. Difference in Legal Force

Our “local version of the fiduciary doctrine”¹²⁷ has a different character to the *sui generis* fiduciary duty. Conceptually, they are similar. It is not far to make the jump from fiduciary to fiduciary-like. However, their method of legal application differed significantly. *The SOE case* used the fiduciary doctrine as an analogy to help interpret statutory references to “the principles of the Treaty of Waitangi.” In contrast, *Guerin* used the fiduciary relationship to grant equitable remedies and rewarded damages against the Crown for failing to protect the Band’s interest. Even though Cooke P claimed *the SOE case* was in line with *Guerin*, this application has been referred to as an “utterly orthodox” exercise of statutory interpretation.¹²⁸

McHugh suggests that the difference between the rule of interpretation and the fiduciary doctrine is that the former assists the definition of the way in which a power is to be used, whereas the latter restrains use of any power other than in a manner consistent with the fiduciary duty. The difference is essentially one of degree and potency.¹²⁹ Such reality does not sit well with Cooke P’s comment in *Muriwhenua* that it is unattractive to suppose obligations owed by the Crown to Indigenous peoples in New Zealand is less onerous than that of Canada.

3. Difference in Legal Source

Another difference between the *sui generis* duty and the fiduciary-like duty is that the latter recognises the Treaty of Waitangi as its source of creation, while the former has its basis in historical interactions between two groups. The consequence of the fiduciary-like duty being *created* by the Treaty is that its legal enforceability also depends on the status of the Treaty itself. The Treaty has an incoherent legal status and inconsistency in legal force as Palmer acknowledges that the Treaty is part of our law for some purposes and not others.¹³⁰ While it has been acknowledged to have moral force and likely to have force at international law, he also expects that if faced with question today, the Supreme Court may still affirm an “orthodox view”¹³¹ that the Treaty is not legally enforceable in

¹²⁷ Paul McHugh *The Māori Magna Carta: New Zealand Law and the Treaty of Waitangi* (Oxford University Press, Auckland, 1991) at 248.

¹²⁸ R P Boast “*New Zealand Māori Council v Attorney-General: The case of the century?*” [1987] NZLJ 240 at 243.

¹²⁹ McHugh above n 127, at 251.

¹³⁰ Matthew Palmer, *The Treaty of Waitangi in New Zealand’s Law and Constitution* (Victoria University Press, Wellington, 2008) at 232.

¹³¹ Luskie above n 114 noting the fact that the Court has not departed from the principle espoused in *Te Heuheu Tukino v The Aotea District Māori Land Board* [1941] NZLR 590 (PC).

domestic New Zealand law unless it is incorporated into law by legislation.¹³² This means the Treaty has direct or indirect binding force on the executive government as interpreted by the Waitangi Tribunal or the Courts in some areas of law and not others, depending on whether it is incorporated into legislation.¹³³

Therefore, the extent to which the fiduciary-like duty may be applied and developed by the courts is “to the extent it “enjoys legitimacy in their exercise of judicial power.”¹³⁴ The status of the fiduciary-like duty is ancillary to the legal status of the Treaty. The antithesis of this would be the Treaty being enforceable as a matter of equity.¹³⁵ Thus, the Courts have merged Treaty doctrines with the doctrine of Indigenous fiduciary rights when analysing the history of the relationship.¹³⁶

Apart from incorporating its principles into statute, Parliament also recognised the Treaty of Waitangi through the Treaty of Waitangi Act 1975 for the purpose of establishing the Waitangi Tribunal. The Waitangi Tribunal is a statutory body charged with the purpose of investigating Treaty breaches.

In the Court of Appeal of *Wakatū v Attorney-General*, Harrison and French JJ saw the provision of remedies for Treaty breaches through the Waitangi Tribunal as supporting the recognition that the Treaty is the primary source of the Crown’s legal *and* moral duties. This is in clear contrast to Cooke P’s comment in *Te Ika* which implied that the Crown’s obligation may also stem from a common law obligation to protect Māori property rights.¹³⁷ The fact that Elias CJ saw the Tribunal and Court’s roles as fundamentally different because they concern different kinds of legal rights¹³⁸ suggests that her Honour sees “political” Treaty rights and other sources of common law rights as separate. The Crown’s political relationship with Māori is therefore, not the same as its legal relationship with Māori, and an exclusive focus on obligations stemming from the Treaty may mean that the Courts have been focusing on only one element of the relationship.

¹³² Palmer, above n 130, at 231.

¹³³ *Ibid* at 231.

¹³⁴ *Ibid* at 233. Also see Cooke P’s comment in *the SOE case* above n 21 “if the judiciary has been able to play a role to some extent creative, that is because the legislature has given the opportunity.”

¹³⁵ Palmer, above n 130, at 203.

¹³⁶ Donna Hall “The Fiduciary Relationship Between Māori and the Government in New Zealand” in Law Commission of Canada, *In Whom We Trust: A Forum on Fiduciary Relationships* (Law Commission of Canada, Toronto, 2002) at 136.

¹³⁷ Also noted *Paki SC*, above n 76, at [153] per Elias CJ. Her Honour mentioned the case *Re the Landon and Whitaker Claims Act 1871* “The Crown is bound, both by the common law of England and by its own solemn engagements, to a full recognition of Native proprietary right. Whatever the extent of that right by established native custom appears to be, the Crown is bound to respect it.”

¹³⁸ *Ibid* at [165].

Conclusion:

In its own way, the Treaty relationship has functioned like a political trust. The Treaty was seen as the main source of the Crown's obligations and this consequently meant the Crown-Māori relationship was characterised solely by the Treaty. This made it harder to recognise or advance common law rights of claim as doing so would mean undermining the statutory scheme established in the Treaty of Waitangi Act 1975.¹³⁹

¹³⁹ Ibid at [196] per by McGrath J.

Chapter 4: The Lower Courts' Private Framework

This chapter aims to explain the framework used by the lower courts in New Zealand to assess whether a fiduciary obligation could be owed by the Crown. The fiduciary obligation was one that was “private in character”¹⁴⁰ as opposed to an obligation that was “in the nature of a private law duty” in *Guerin*.¹⁴¹ Challenges were posited by the Courts that occluded the imposition of this private fiduciary duty by applying traditional equitable fiduciary principles. First, the facts of *Paki* will be outlined. Secondly, the High Court and Court of Appeal rejections in both cases will be discussed together as they posited similar challenges. Broadly, there is a rejection of a general duty and a specific duty. The specific duty’s rejections will be discussed in detail as this occupies most of the Courts’ analysis. The main challenges presented are labelled as loyalty,¹⁴² undertaking,¹⁴³ vulnerability¹⁴⁴, and political constitutionalism.¹⁴⁵

1. Facts of *Paki v Attorney-General (No 2)*

The presence of the Native Land Court in the facts of *Paki* is an essential point of differentiation to *Wakatū*. The Court was established in 1864 as a judicial body independent of the Crown responsible for the process of converting customary Māori ownership of land into a “Pākehā system” of title based on the English concept of freehold tenure.¹⁴⁶ This made it easier for third parties to purchase Māori land as it enabled them to purchase the freehold land directly from Māori proprietors.¹⁴⁷ The Court also had power to ascertain and decide whether Māori, according to native custom or usage was entitled to their native land.¹⁴⁸

The original owners were awarded Māori freehold interests in the Pouakani blocks along the Waikato River, and entered into a sale and purchase agreement with the Crown. The sale gave the Crown ownership of the bed of the river to the middle of the flow by way of a conveyancing presumption of English common law (“*usque ad medium filum aquae*”). However, the presumption was never adequately explained to Māori. The claimants allege that the failure to advise the owners of the

¹⁴⁰ *Wakatū CA*, above n 3, at [24].

¹⁴¹ *Guerin*, above n 11, at 385.

¹⁴² Used by Harrison J in *Paki HC*, William Young J in *Paki SC*, Clifford J in *Proprietors of Wakatū v Attorney-General* [2012] NZHC 1461 (*Wakatū HC*), Harrison and French JJ and Ellen France J in *Wakatū CA*.

¹⁴³ used by Ellen France J in *Wakatū CA* and Harrison J in *Paki HC*.

¹⁴⁴ used by Hammond J in *Paki CA*.

¹⁴⁵ by Ellen France J and Harrison and French JJ in *Wakatū CA*, and McGrath J in *Paki SC*.

¹⁴⁶ *Paki HC*, above n 56, at [117] per Harrison J.

¹⁴⁷ Ministry of Culture and Heritage “Native Land Court Created” (updated 17 May 2017) <<https://nzhistory.govt.nz/page/native-land-court-created>>.

¹⁴⁸ Native Land Court Act 1886 s 19.

principle and to obtain their informed consent was a breach of the fiduciary obligations owed by Crown to the original owners.

2. Rejections

1) Rejections of a General Duty

Distinctions were made in both cases regarding a “generic” or general duty based on the Treaty of Waitangi¹⁴⁹ and a specific duty resting on “principled foundations”.¹⁵⁰ Both Judges share the same rationale for the rejection of the generic duty and it was seen as a straightforward task.¹⁵¹

Two lines of argument were employed. To the extent that a general duty may arise from the Treaty of Waitangi, the Courts simply referred to O’ Regan J from the *Forests* Court of Appeal case,¹⁵² reiterating the fiduciary doctrine’s guiding function rather than its ability to be applied directly.

The second argument employed pointed to the fact that the Canadian Courts themselves do not recognise a general fiduciary duty. Harrison J states:¹⁵³

The Canadian authorities are settled. The Crown does not owe a fiduciary duty *at large* to its indigenous people or a group of them. An express undertaking assumed or implied from a particular instrument to represent or protect a specific interest is required. (emphasis added)

2) Rejections of a Specific Duty

This left the substantive judgments devoted to the recognition of a specific fiduciary duty arising from the circumstances, specifically a duty arising from the “factual” category identified in *Chirnside v Fay*.¹⁵⁴ The significance of nearly all judges¹⁵⁵ using *Chirnside v Fay* as their analytical starting point is that they have rested their reasoning on settled orthodox fiduciary principles or a “true fiduciary analysis”, instead of the accommodations of the duty seen in Canada. Furthermore, using the factual category to assess such situations implies that *Guerin* had not created a status-based category.

¹⁴⁹ *Paki HC*, above n 56, at [108] per Harrison J and *Wakatu HC*, above n 56, at [277] per Clifford J.

¹⁵⁰ *Paki HC*, *Ibid* at [116].

¹⁵¹ *Wakatū HC*, above n 56, at [277] per Clifford J “To the extent that, by reference to those Canadian cases and their acknowledgment in New Zealand, the plaintiffs might be seen as arguing for some general fiduciary duty owed by the Crown to Māori, the answer I think is relatively straightforward”.

¹⁵² *Ibid* at [278], *Paki HC*, above n 56, at [116] and [141].

¹⁵³ *Paki HC*, *Ibid* at [141].

¹⁵⁴ *Wakatū HC*, above n 56, at [283], *Paki HC*, above n 56, at [115].

¹⁵⁵ *Paki HC*, *Ibid* at [113] per Harrison J, *Wakatū HC*, *Ibid* at [269] per Clifford J, *Wakatū CA*, above n 3, at [116] per Ellen France J, and at [205]-[206] per French and Harrison JJ.

Even so, the judges had different interpretations of *Guerin*'s relationship with orthodox fiduciary law. Ellen France J rested her starting point in Dickson J's approach in *Guerin*, which was seen as being synonymous with *Chirnside v Fay*. Similarly, Harrison and French JJ saw *Guerin* as an application of settled principles without conceptual difficulty. This interprets *Guerin* cases as being a continuation of traditional fiduciary law, as opposed to a side branch coming off the main stem.

This is in direct contrast to the interpretation of *Guerin* from Elias CJ and McGrath J's discussion in *Paki (No 2)*. Elias CJ surmised that the *Guerin*-fiduciary duty did not seem to depend on loyalty, even though it is a usual characteristic of the relationship,¹⁵⁶ and McGrath J considered the *sui generis* fiduciary duty may apply even when "the application of general principles developed in relation to private commercial transactions of general equitable principles may not give rise to such a duty".¹⁵⁷ Both Judges are implying the *Guerin*-fiduciary duty may arise in situations that normal equitable principles would typically not allow. In response, Harrison and French JJ deprecated the possibility of the term "*sui generis*" being used to describe the nature of the underlying relationship, implying McGrath J used the phrase solely to describe a particular factual context.¹⁵⁸ Loyalty was to exist in the same way as it would in situations involving "ordinary" fiduciaries.¹⁵⁹

The rejections share both commonalities and differences. The commonality is the content of some of the arguments. The difference is the mode of how they used the arguments.

3. Challenges

1) Loyalty

An inevitable outcome of applying "settled" equitable principles is that loyalty was strictly demanded to be present both as a requirement of the duty *and* as a content of the duty.

The claimants in the Court of Appeal of *Wakatū* relied on Elias CJ's observation in *Paki* that the Canadian authorities did not seem to depend on a relationship characterised by loyalty. In response, Clifford J, Harrison and French JJ in *Wakatū* and Harrison J in *Paki* did not think a fiduciary duty could exist without it.¹⁶⁰ It was an "essential pre-requisite"¹⁶¹ and the situation's uniquely indigenous

¹⁵⁶ *Paki SC*, above n 84, at [155].

¹⁵⁷ *Ibid* at [186].

¹⁵⁸ *Wakatū CA*, above n 3, at [210].

¹⁵⁹ *Paki SC*, above n 84, at [283] per William Young J.

¹⁶⁰ *Wakatū CA*, above n 3, at [211] per Harrison and French JJ.

¹⁶¹ *Ibid*.

nature did not change that. This approach first considered the *possibility* of the duty of loyalty being able to exist in the circumstances and only after this could the fiduciary duty exist.

Clifford J and Harrison and French JJ thought the constitutional nature of the Crown's role prevented the possibility of the duty of loyalty arising as it would be "fundamentally incompatible" with its role as government. By acting pursuant to its right of pre-emption, the Crown's role was not only to protect the interests of Māori. It was also required to balance the interests of Māori against the interests of those who argued they had "equitably" acquired land from Māori, and more broadly, the general population.¹⁶² Clifford J however, notes the timeframe 1845 to 1856 as a strong contender for the recognition of a fiduciary duty because once the reserves were recognised, the need for the Crown to balance competing interests had ceased.¹⁶³

The loyalty argument was applied in *Paki* under different circumstances. The Crown was a direct party to an agreement of sale and purchase with owners of freehold land, making the relationship akin to one between vendor and private purchaser. This commercial element prevented the possibility of the Crown owing an obligation of loyalty as the transaction was one at arm's length. The freedom to act in the Crown's own interest would give rise to a conflict of interest if it were also to act in the best interests of Māori.¹⁶⁴

Ellen France J also determined that the Crown could not owe a duty of loyalty to the customary owners. The reasons behind this were the same as the other Judges in content, but different in how the reasons were advanced. Unlike the other judges, Ellen France J did not prevent a duty arising outright because of the Crown's constitutional role. Instead, as an extra step, her Honour used the availability of other remedies, namely that of redress through the Waitangi Tribunal, as a sliding scale to determine what the loyalty requirement needed to look like in the circumstances. In this instance, the presence of the Treaty process warranted a demonstration of loyalty as the term is "traditionally understood."¹⁶⁵ This infers that where there is an omission of other available remedies, loyalty may be relaxed to mean something not "traditionally understood."

There is reason to suggest their Honour's approach of treating loyalty as a requirement is wrong. Hayono notes that "loyalty... is the consequence of identifying a fiduciary relationship, not the key to identifying it in the first place."¹⁶⁶ The process of identifying a fiduciary relationship is different to

¹⁶² *Wakatū HC*, above n 56 at [301], *Wakatū CA*, above n 3, at [209].

¹⁶³ *Wakatū HC*, *Ibid* at [309].

¹⁶⁴ *Paki HC*, above n 56, at [122]-[125].

¹⁶⁵ *Wakatū CA*, above n 3, at [115].

¹⁶⁶ *Hoyano*, above n 28 at 179.

identifying its contents. Ellen France J’s approach is in line with Hayano’s argument. Loyalty *could* exist in the circumstances, but its character was first influenced by the availability of remedies.

Loyalty also meant different things to different Judges. Those who were strict in their conception of loyalty seemed to imply an uncompromising view of the no-conflict rule. Their Honours did not differentiate if the conflict was an actual conflict or a potential conflict. *Mothew* held that a fiduciary may still act where there is a potential conflict by obtaining the informed consent of all beneficiaries to act for them.¹⁶⁷ However, Ellen France J’s recognition that there may be situations where loyalty does not need to manifest itself in a way that is traditionally understood implies that the no-conflict rule does not need to be so strictly conceived.

As discussed in Chapter One, there is disagreement about whether the fiduciary duty is prescriptive or proscriptive in nature. O’Regan J’s comment in *the Forests* case touches upon the difficulty of the Crown owing loyalty when there is a duty to serve the interests of conflicting bands. Even as a proscriptive or negative duty, the Crown may find it difficult to avoid conflicting interests. How can it then be expected to be prescriptive in the same way Cooke P thought of the “active protection” of the fiduciary-like duty? However, the facts in *Wewaykum* involved exactly what O’Regan J feared: a situation of conflicting bands. Its test suggests there are variable degrees to the content, as well as the nature of the duty. Before an interest has been created, the Crown may have somewhat of a “soft” loyalty. This involves avoiding harming the beneficiary to the minimum extent possible. After an interest has been created, the duty then becomes more active to protect and preserve that interest.

2) Political Constitutionalism:¹⁶⁸

The ability to seek remedy through the Waitangi Tribunal also found against the Court’s willingness to impose a fiduciary obligation. To Harrison and French JJ, it was unnecessary to fashion a “parallel remedy” to address something already provided for by legislature simply because the “demands of justice” calls for it. Their Honours suggested because Parliament has already legislated for the way to address Crown-Māori situations, it would be wrong for the Courts to intervene. This is supported by McGrath J’s warning against the Courts developing the law to the extent of making the statutory scheme redundant.¹⁶⁹

¹⁶⁷ *Mothew*, above n 33, at [18]-[19].

¹⁶⁸ Language used by Bookman, above n 61, at 360.

¹⁶⁹ *Paki SC*, above n 84, per McGrath J at [189].

One aspect of the significance of this challenge has been discussed in Chapter Three.^{168.1} What is important for the present discussion is that while this prevented Harrison and French JJ from undertaking an equitable exercise to find whether a duty existed, Ellen France J saw this as being part of the equitable exercise. As explained, the presence of another remedy shaped what loyalty was expected to look like. This did not foreclose or prevent the duty arising outright.

3) Undertaking

Ellen France J and Harrison J noted the requirement of an undertaking, and also used its absence to prevent the recognition of a fiduciary duty.¹⁷⁰ *Alberta v Elder Advocates of Alberta Society (Elder Advocates)* was relied upon by Ellen France J for its useful summary of the three conditions required for the imposition of the duty:¹⁷¹ an undertaking to act in the beneficiary's best interest, a defined person or class vulnerable to their control, and a legal or substantial practical interest affected by that control.¹⁷² Applying this test, no instrument was deemed to comprise any undertaking.¹⁷³

Elder Advocates did not involve Crown and Indigenous peoples. It concerned a class action by elderly residents of Alberta's long-term care facilities alleging that the government artificially inflated accommodation charges. The judgment was concerned with *distinguishing* the Crown-Indigenous duty as an instance where the Crown *can* owe a duty to its citizens. It is unclear whether its formulation of the "three general characteristics" are applied to all fiduciary relationships, Indigenous or otherwise. On the one hand, McLachlin J recognised the *sui generis* nature of the Crown-Indigenous fiduciary duty by indicating that the duty is *unique* and *grounded in analogy* to private law.¹⁷⁴ He distinguished the Crown-Aboriginal duty as being inapplicable to Crown-and-other-citizens contexts because of the "unique and historic nature of Crown-Aboriginal relations". Yet at the same time, his Honour proceeds with determining Crown-Indigenous relations as fulfilling the three general characteristics, even though they are characteristics applied to general *ad hoc* situations.¹⁷⁵

The *Wewaykum* test is slightly different to the *Elder Advocates* formulation. First, the *Wewaykum* test did not specify an undertaking to act in the best interests, only an undertaking of control over a

^{168.1} See Chapter Three "Difference in Legal Source".

¹⁷⁰ See *Wakatū CA*, at [135]: "The 1845 grant itself does not contain any undertaking but, rather, simply omits the reserves from the grant." and *Paki HC*, at [116]: "An express undertaking assumed or implied from a particular instrument to represent or represent a specific interest is critical."

¹⁷¹ *Ibid* at [107].

¹⁷² *Elder Advocates*, above n 81, at [48].

¹⁷³ Above n 3, at [143].

¹⁷⁴ Above n 81, at [40]. McLachlin CJ notes the "unique and historic nature of Crown Aboriginal relations" is different to the duty of the government to citizens in other contexts.

¹⁷⁵ *Ibid* at [48]-[51].

specific Aboriginal interest. Secondly, the interest in *Elder Advocates* did not need to be distinctly aboriginal, only a legal or substantial practical interest was needed. Thirdly, a defined person or class was not specified in the *Wewaykum* test. The most recent Crown-Indigenous case *Manitoba Metis Federation Inc v Canada (Attorney-General) (Manitoba Metis)* interpreted the two tests as separate.¹⁷⁶ This is significant as it implies the Indigenous-fiduciary cases are in fact *sui generis*, with a more relaxed requirement for loyalty in the Indigenous context as suggested by Elias CJ in *Paki*. A possible interpretation is that the tests are separate but overlap. There may be situations that fulfil requirements for both a distinctly Indigenous fiduciary duty *and* a general fiduciary duty.

It is not surprising that Ellen France J viewed *Elder Advocates* as part of the fabric of traditional fiduciary duty jurisprudence given she also viewed Crown-Indigenous cases as coming under the same orthodox umbrella. However, her Honour incorporated *Elder Advocates*' reference to the Royal Proclamation 1763 and Constitution Act 1982 as sufficient undertaking in the Canadian Crown-Indigenous setting.¹⁷⁷ These undertakings have the character of being historical commitments of a general nature to an entire class of peoples, as opposed to a specific undertaking in a particular transaction. In fact, the Royal Proclamation 1763 has similar content to the Treaty of Waitangi. It affirmed the existence of Aboriginal title, provided for the role of pre-emption to Crown-purchases of Indigenous land, and established that no private person could purchase from Indigenous peoples any lands that the Proclamation had reserved to them.¹⁷⁸

4) Vulnerability

Toohy J, the minority Judge in the Australian High Court decision *Mabo v Queensland (No 2) (Mabo)*, also focused on the concept of vulnerability when considering whether the Crown owed fiduciary obligations to the Meriam people to protect their native title. His Honour found that the Crown's extraordinary power to extinguish native title and the corresponding vulnerability of this power was sufficient to give rise to a fiduciary obligation.¹⁷⁹ However, there is disagreement in case law as to whether vulnerability is a necessary ingredient in every fiduciary relationship¹⁸⁰ and whether it is a characteristic non-endemic to the fiduciary relationship.¹⁸¹

¹⁷⁶ Above n 93, at [46]-[59].

¹⁷⁷ *Wakatū CA*, above n 3, at [107].

¹⁷⁸ Rotman, above n 17, at 38.

¹⁷⁹ *Mabo*, above n 38, at [85].

¹⁸⁰ *Lac Minerals*, above n 90, at 38 "vulnerability is not... a necessary ingredient in every fiduciary relationship." Also see *Hodgkinson v Simms* (1994) 117 DLR (4th) 161 at 176 "vulnerability is not the hallmark of a fiduciary relationship though it is an important indicum of its existence."

¹⁸¹ Rotman, above n 13, at 137 and Weinrib, above n 43, at 6: "Vulnerability cannot be the *sine qua non* of a fiduciary obligation" because there are other forms of interaction which are not generally understood to be fiduciary, but in which significant vulnerability of one party to another exists.

The concept of vulnerability prompted Hammond J in the Court of Appeal in *Paki* to reject fiduciary law application in the Crown-Māori context and propose another vehicle to determine legal disputes of Crown-Māori relations- the relational duty of good faith. For Hammond J, it was especially problematic that the term fiduciary implies a superiority of the Crown and inferiority of Māori, which is at odds with the historical fact of the Treaty of Waitangi, an equal partnership between the parties.¹⁸²

However, Hammond J's fears may be unwarranted. In the Canadian-Indigenous context, vulnerability or inequality of power was not emphasised as a specific element. Rather, it is the discretion associated with the power assumed, rather than the actual power dynamic itself that was the focus.¹⁸³ The connotation is indeed unfortunate if it implies an *inherently* unequal footing between two parties, but it is not if the vulnerability is a characteristic that arises *within* the relationship as a result of dependency.¹⁸⁴ Frankel explains "even entrustors who are in a strong bargaining position before they enter the relationship become vulnerable immediately after they entrust power or property to their fiduciaries".¹⁸⁵

¹⁸² *Paki CA*, above n 9, at [103].

¹⁸³ Above n 11, at 384 per Dickson J "where the obligation to act... carries with a a discretionary power."

¹⁸⁴ Rotman, above n 13, at 136.

¹⁸⁵ Tamar Frankel, "Fiduciary Duties as Default Rules" (1995) 74 Or L Rev 1209 at 1216.

4. Conclusion

The challenges laid down by the Courts were posited through the lens of “ordinary” fiduciary relationships; The Crown-Māori relationship is not special enough to have its own category. One may have expected this to be an easier task than figuring out what “*sui generis*” fiduciary relationships require, however it was complicated due to the fact that orthodox fiduciary jurisprudence is also confused about its own requirements, and its relationship with Canadian-Crown-Indigenous case law.

By viewing everything as the same branch of the tree, the Courts were also able to evade previous discussions afforded to the *sui generis* role of the Crown as a fiduciary. Canadian cases like *Wewaykum* were relied upon for its limitation function of the scope of the duty¹⁸⁶ but not appreciated for its discussion of the Crown’s unique role as a fiduciary and its important message that the Crown may not shirk its fiduciary duty by simply invoking competing interests.¹⁸⁷ Therefore, the Courts took an uncompromising position on what the fiduciary role of the Crown was expected to look like. The Crown’s constitutional role did not fit well within these strict confines of equity. On the flipside however, a private framework could avoid the unfortunate implication of vulnerability suggested by Hammond J, as solely focusing on the private actors and the immediate situation would not imply a power dynamic any broader than the two private parties involved.

As discussed in Chapter One, there is tension in fiduciary law with regards to the balance between identifying rules to prevent a dilution of equity and the need for the relaxation of those rules to do justice in an individual case. The hesitancy of judges to extend fiduciary concepts beyond comfortable limits may be the same reason some view the extensions of fiduciary law as diluting the purity of the concept and becoming increasingly manipulated so that it is no longer reserved for situations in which the high fiduciary standard of conduct is expected.¹⁸⁸

¹⁸⁶ *Paki HC*, above n 56, at [116] per Harrison J and *Wakatū HC*, above n 56, at [280]-[282] per Clifford J.

¹⁸⁷ *Wewaykum*, above n 34, at [104].

¹⁸⁸ *Thomas*, above n 27, at 407.

Chapter 5: The Supreme Court's Direct Application of the Fiduciary Duty in *Wakatū*

The fiduciary label has been applied through a strictly private framework, and a purely public one. This Chapter asks which framework the Supreme Court used in their direct application of the fiduciary doctrine. First, the different approaches of the judges are outlined. Then, the different frameworks used by the judges will be contrasted to each other and an argument will be advanced for the most desirable framework to view the Crown-Māori relationship. Finally, it will be asked how far the relationship can expand based on requirements posited by the Supreme Court.

1. The Different Approaches

Broadly, the judgment may be summarised as consisting of a dissent by William Young J rejecting the application of the fiduciary doctrine, and a majority who used equitable principles. The majority travelled different paths to get to the same end point. Amongst them, Glazebrook J applied the true-trust analysis. Her Honour assessed the facts against the requirement of certainty of intention, object, and subject matter,¹⁸⁹ and concluded that not allocating the rural tenths reserves was a breach of trust.¹⁹⁰ Her Honour's analysis did not depend on any special fiduciary duty of the Crown in its dealings with Māori but pointed to Elias CJ's judgment if such analysis was necessary.¹⁹¹

The natural corollary of this is that the rest of the majority *did* depend on a "special fiduciary duty of the Crown." Mirroring *Guerin*, two different approaches were adopted. Arnold and O'Regan JJ relied on the "trust-like" Dickson J approach¹⁹², while Elias CJ broadly adopted the Wilson J crystallization-into-a true-trust approach.¹⁹³ In the eyes of Arnold and O'Regan JJ, the Crown's acceptance of the Spain award crystallized the fiduciary obligations to Māori, while to Elias CJ, the same award crystallized those fiduciary duties into obligations of trust.¹⁹⁴

The factual focus was also different. Arnold and O'Regan JJ focused on only one component of the facts: that of the Crown's conduct regarding the tenths. Their Honours especially emphasised the element of the Crown's assumption of responsibility through the 1840 agreement as demonstrating that the Crown took over the Company's obligations to both administer and manage the tenths.¹⁹⁵ This obligation was crystallized by accepting Commissioner Spain's recommendations, allowing the

¹⁸⁹ Above n 4 at [571]-[582].

¹⁹⁰ At [587].

¹⁹¹ At [590].

¹⁹² At [779].

¹⁹³ At [393]-[394].

¹⁹⁴ At [393].

¹⁹⁵ At [781].

Company to obtain cleared title.¹⁹⁶

Elias CJ also focused on the conduct of assuming responsibility of the tenths. She referred to the *Wewaykum* test¹⁹⁷ and considered that the Crown assumed discretionary control over property through the many instances it exercised control in their management of income, and assertion of legal ownership of the reserves.¹⁹⁸ She referred to this as “simply application of the ordinary law to the Crown” whose actions would constitute a private person a trustee.¹⁹⁹ Those ordinary laws cited in her judgment point to the indication that the Crown may constitute itself a trustee by undertaking the role expressly or where it is clear it has chosen to do so.²⁰⁰ In that capacity, the Crown is not acting as a sovereign. It is answerable to equitable wrongs committed just like anyone else.²⁰¹

Additionally, Elias CJ focused a wider context than the undertaking of the tenths. Her Honour relied on Wilson J’s approach to find the Crown a trustee through its broader role in the Land Claims Ordinance process itself. Her Honour relied on Toohey J’s approach on finding a power and corresponding vulnerability,²⁰² and focused on fact that the Spain award also effected a surrender of land as did in *Guerin*:²⁰³

Where there are pre-existing and independent property interests of Māori which can be surrendered only to the Crown (as under a right of pre-emption) a relationship of power and dependency may exist in which fiduciary obligations properly arise.

It is unclear whether it is in all instances of pre-emption a fiduciary obligation exists or the additional investigative function of the Commission is also necessary. Much like Toohey’s point that *Guerin*’s inalienability except by surrender to the Crown is an attribute of traditional title,²⁰⁴ pre-existing Māori interests that can only be surrendered to the Crown is a feature of the right of pre-emption. This right of pre-emption, like the surrender of land in *Guerin*, has a protective function.²⁰⁵ It effectively gave the Crown full discretion over the purchase price. Instances where Crown officials paid low prices for

¹⁹⁶ At [782].

¹⁹⁷ *Ibid* at footnote 487, referencing *Manitoba Metis*, above n 93, at [49].

¹⁹⁸ At [410]-[413].

¹⁹⁹ *Ibid*.

²⁰⁰ At [331], citing *Pawlett v Attorney-General* (1678) Hard 465, 145 ER 550 (Exch) at 552. In that case, the Crown obtained interest of a mortgage by forfeiture and was required to afford to the mortgagor the equity of redemption.

²⁰¹ At [339].

²⁰² At [391].

²⁰³ *Ibid*.

²⁰⁴ *Mabo*, above n 38, At 203.

²⁰⁵ Alan Ward *An Unsettled History: Treaty claims in New Zealand today* (Bridget Williams Books, Wellington, 1999) at Chapter 8. Ward notes the pre-emption requirement was “partly to protect Māori from private land sharking”.

huge blocks, were careless about boundaries, allowed minimal reserves and took advantage of divisions among Māori owners²⁰⁶ may also constitute a breach of that duty.

The two approaches which applied *Guerin* were explicitly careful in restricting the scope of the duty. Elias CJ states “none of this is to suggest that there is a general fiduciary duty at large owed by the Crown to Māori”. Similarly, Arnold and O’Regan JJ in a footnote, acknowledges the possibility of a “broader basis” for the duty arising from the Treaty of Waitangi and the Crown’s right of pre-emption, however their Honours expressly limited the application of duty to the specific dealings.²⁰⁷

2. Significance of the *Wilson v Dickson JJ* approach

There are two aspects to the identifiable differences in *Wilson* and *Dickson JJ*’s approach.²⁰⁸ One is the form the obligation takes; whether the fiduciary obligation crystallizes into a trust. The other difference is the basis of the duty, or how the duty is created. According to Rotman, the significance of the difference of the former aspect is only evidentiary. Once an equitable obligation is established, it is immaterial whether those obligations are derived from fiduciary or trust law.²⁰⁹ Since the evidentiary requirements for demonstrating a fiduciary relationship is substantially lower than those necessary to prove a trust, the decision “imposes the strict demands of a trustee’s duties on the Crown without imposing the onerous task of establishing the existence or maintenance of a trust on aboriginal peoples.” This is accurate as *Wilson J* thought the historic reality itself could not constitute a trust because the Band did not have sufficient interest in their lands²¹⁰ but went on to establish a trust through crystallization from a fiduciary duty. Frame suggested this approach is akin to a “legal fiction” which is a device that essentially implies judges manipulate the law to serve the “demands of justice”.²¹¹ This may suggest judicial activism at work in the background, or it may simply reflect equity’s flexibility and ability to intervene in unconscionable circumstances.²¹²

There is disagreement about the latter distinction on the source of the obligations in *Guerin*. For example, Cox interpreted *Wilson J* as creating a general obligation and *Dickson J* as restricting

²⁰⁶ Ibid at Chapter 7.

²⁰⁷ Above n 4, at footnote 1012.

²⁰⁸ Refer to discussion in Chapter 2.2 “The Approaches”.

²⁰⁹ Rotman, above n 17, at 104.

²¹⁰ Above n 11, at 349.

²¹¹ Alex Frame “Fiduciary duty - a few remarks on *Proprietors of Wakati v Attorney-General* [2017] NZSC 17” (2017) April Māori L Rev.

²¹² Bookman, above n 61 at 362 compare *Lac Minerals* above n 90 at [30] where the Supreme Court of Canada has disapproved of the deployment of the fiduciary relationship as a “means to an end” on the basis that this “reads equity backwards”.

fiduciary obligations to instances of surrender.²¹³ Rotman on the other hand, cautions against reading Dickson J's requirement so strictly.²¹⁴ No matter if the distinction is real or not, subsequent Canadian cases have clearly affirmed the source of the Crown's fiduciary duty to be in its historical assumptions of responsibilities.

The significance of the latter distinction is not clear in the majority's approach. Arnold and O'Regan JJ were unequivocally clear that their analysis only comments on the assumption of responsibility regarding the tenths.²¹⁵ Elias CJ however, goes further. Her Honour noted that the Crown's assumption of responsibility *began* with Treaty of Waitangi and the 1840 Charter of Instructions.²¹⁶ Her approach may be interpreted to mean the Land Claims Ordinance is also an affirmation of a historic reality. Her Honour, like Dickson J, focused on the effect of surrender. However, as noted by Binnie J with regards to *Guerin*, this may also be because it happens to be the facts of the case.²¹⁷ Her caution that the relationship does not exist "at large" will be explained further on.

3. The Lenses Adopted by Different Judges

The fiduciary label has been applied through a strict private lens²¹⁸ and a purely public lens.²¹⁹ This section aims to ask what a *sui generis* lens, or a quasi-private-public lens looks like. The private lens was used to both reject and allow the imposition of a fiduciary duty. The reasons preventing the duty relate to the characteristics of the public actor in some way but those characteristics do not fit comfortably within what equitable requirements traditionally mean. Glazebrook J, using the private lens, did not see that public identity prevented the strict duty from arising. Her Honour's approach implies that because this situation would constitute any person a trustee, it would be wrong to deny them a remedy simply because one party happened to be the Crown. This approach only focuses on the particular context of the immediate situation. The parties were seen as private actors, not Crown and Māori. This means the identities of the actors are somewhat irrelevant, making the duty redundant to the exercise of characterising a relationship between those constitutional actors. Elias CJ's approach to the assumption of responsibility of the tenths also implied that it was the Crown's actions that could constitute any person a trustee, not its identity.

²¹³ Noel Cox "The Treaty of Waitangi and the Relationship between Crown and New Zealand" (2002) Brook J Intl L 28 at 129 "Four judges [Dickson J] held that a fiduciary obligation only arose if the land was surrendered, while three [Wilson J] held that a more general obligation to protect the land interests of aborigines existed."

²¹⁴ Rotman, above n 17, at 108.

²¹⁵ *Wakatū SC*, above n 4, at footnote 1012.

²¹⁶ *Ibid* at [380].

²¹⁷ *Wewaykum*, above n 34, at [98].

²¹⁸ Discussion in Chapter Four.

²¹⁹ Discussion in Chapter Three.

The way the judges overcame the challenges do not tell us whether they fashioned the content of the fiduciary duty as *sui generis*. They did not change the meaning of the requirements; they still operated under the same traditional framework of what loyalty meant. Instead, they overcame the challenge through a different interpretation of the facts to the lower Courts. Their factual interpretation is different in that it did not see the Crown as exercising solely a general governmental capacity in the administration of the tenths. Glazebrook J still fashioned a requirement of undivided loyalty, but there were no possible conflicts of interests to undermine this.²²⁰ The only possible conflict was in the selection of the tenths, and this was accounted for through a balloting process.²²¹

Arnold and O'Regan JJ's method of overcoming the conceptual challenges are similar in that they do not challenge the traditional meaning of loyalty advanced by the lower courts, they are only different in their factual interpretation. According to their Honours, The Crown had two capacities. In its governmental capacity, the Crown was concerned to ensure pre-Treaty purchases were fair. However, in its private capacity, it was not called upon to consider balancing the interests of settlers and Māori, it was simply "delivering on the deal."²²² Elias CJ relied on the nature of the exclusive property interest to distinguish the facts from the non-traditional interests in *Wewaykum*.²²³ This suggests that the Crown is not exercising a governmental function or weighing up competing interests when dealing with pre-existing interests.

Curiously, Elias CJ also referred to *Wewaykum* in her analysis for the assumption of the tenths. *Wewaykum* is a perfect example of the *sui generis* fiduciary lens. Its reasoning does not imply the Crown's actions may constitute any private person a trustee. Instead of ignoring the public identities, the case recognises the identity of the Crown, and the historic powers and responsibilities that are unique to the Crown. These historic powers would not have constituted any private person a trustee, and its governmental function of creating reserves were nothing close to being "trust-like". Therefore, instead of viewing the two parties as private actors, they are viewing the two parties as Crown and Indigenous peoples.

The lower Courts' conception of the loyalty duty was that there may be no conflict of interest. *Wewaykum* acknowledged that there are conflicting interests of the Crown in their governmental functions, but held that conflicting interests is factor that shapes the content of loyalty. By holding basic obligations of loyalty and good faith to still exist along with conflicting interests, the Court is

²²⁰ Above n 4, at [582].

²²¹ Ibid.

²²² At [785].

²²³ At [389].

defining loyalty in a way that can co-exist with its unique role. Therefore, it would be more accurate for Elias CJ's comment in *Paki* to be that the Canadian cases do not seem to depend on a relationship characterised by the *traditional notions* of loyalty.²²⁴

Conflating the two tests may mean Elias CJ is recognizing that there are overlaps. There may be times where actions clearly demonstrate an assumption of trust based on the private facts, and also fulfil the *Wewaykum* test and occupy the role of the Crown. However, it is unclear from the Supreme Court's majority judgment whether the lens adopted is *sui generis* to the extent that the duty moulds and accommodates the Crown's constitutional role in defining the duty of loyalty, or whether the Court demanded loyalty in equally as strict a fashion as the lower courts.

4. The Correct Lens

Now that the different lenses adopted have been outlined, it will be argued that the *sui generis* lens is the most desirable one to employ in the Crown-Indigenous context. Doing this involves first clarifying the language used by the Court, the true source of the obligations and the effect this will have on future cases.

1) The Meaning of "At large"

Wewaykum has been used many times to support a view that the Crown-Indigenous relationship does not exist "at large".²²⁵ Elias CJ also used this phrase.²²⁶ As noted in Chapter Two, Binnie J's limitations actually affirms the existence of a general relationship between Crown and Aboriginals.²²⁷ The effect is only to say that a Crown-Indigenous relationship existing "at large" is no different to any other relationship existing "at large". It cannot exist at large in the sense that not all dealings within it are fiduciary in nature. But that does not prevent the recognition of a wider relationship than the specific dealings since specific parties in the Indigenous context will also identify with a wider Indigenous group that the Crown undertook to protect. The language of "at large" was used to refer to a groundless fiduciary duty arising in any circumstance imaginable.²²⁸ It should not be confused with the ability to characterise a fiduciary relationship between two groups.

In contrast, McLachlin CJ used the assertion "fiduciary duties do not exist at large" in connection

²²⁴ *Paki SC*, above n 76, at [155].

²²⁵ *Paki HC*, above n 56, at [141] and *Wakatū HC*, above n 56 at [282].

²²⁶ *Wakatū SC*, above n 4, at [391].

²²⁷ *Wewaykum*, above n 34, at [79]-[80].

²²⁸ *Ibid* at [81].

with stating “they are confined to *specific* relationships between *particular* parties”.²²⁹ This calls into question whether “all Māori”²³⁰ are particular enough to constitute a particular party, and whether their relationship with the Crown is specific enough to constitute a specific relationship, as compared to groups such as the Musqueam Band, or Te Tau Ihu Māori. The challenges are the practical difficulties of defining “all Māori” in the contemporary setting.²³¹ Māori societal structures are not fixed within the cornerstones of iwi and hapū. Rather, they are constantly evolving to suit the needs of a changing group. Therefore, the traditional structure of Māori society has weakened as Māori have lost traditional connections with their tribal group.²³² It should not be overlooked however, that McLachlin CJ conceded that the government has fulfilled this requirement towards Aboriginal peoples by the Royal Proclamation 1763 and Constitution Act 1982.²³³ This implies that Indigenous populations as a whole are specific enough to fulfill the requirement of a “defined class of persons”.

2) The True Source of the Crown’s Obligations

There is a difference between the source of a relationship and the requirements giving rise to a fiduciary element within the relationship. In *Wewaykum*, the latter involved the finding of a specific interest, and an assumption of control over that interest. For Elias CJ, it was a situation of power and dependency and a pre-existing interest inalienable to the Crown. These requirements only triggers or “crystallizes” a fiduciary obligation within the general relationship, it is not the source of the relationship. The source is implied by the language of Dickson and Wilson JJ and acknowledged in subsequent case law, including *Wewaykum*. It is the historic reality of the Crown’s assumption of powers and responsibilities in relation to Indigenous rights.²³⁴ These historical dealings must be looked at cumulatively as colonization did not simply occur through the “activities of incoming European powers, but through a complex series of interactions among various settler groups and Aboriginal nationals.”²³⁵ There are differences of historical fact between Canada and New Zealand. But the key similarity is the historical protection of the interests of Indigenous peoples, confirmed by the Treaty of Waitangi and the Royal Proclamation, and the “degree of economic social and proprietary control and discretion” asserted by the Crown.²³⁶ The Treaty of Waitangi supports the historic reality and gives it added potency.

²²⁹ *Elder Advocates*, above n 81, at [33].

²³⁰ *Forests HC*, above n 123 at [84] per Gendall J.

²³¹ Lanning, above n 34, and Ling Yan Pang “A Relationship Duty of Good Faith: Reconceptualising the Crown-Maori Relationship” (2011) 17 AULR 249 at 256.

²³² Lanning, *Ibid* at 465.

²³³ Above n 81 at [48].

²³⁴ *Wewaykum*, above n 42, at [79]-[80], *Sparrow* above n 73, at 1108.

²³⁵ Brian Slattery, cited in Hall, above n 136, at 136.

²³⁶ See Katherine Feint “Sole Arbiter of its Own Justice? The Courts’ Role in Supervising the Crown-Māori relationship” in Dennis Clifford and Others, *Scrutinising the Actions of Government* (NZLS, 2014) 39 at 42 for an outline of the Crown’s historical assumptions of responsibility.

The *sui generis* lens supports this recognition. In *Guerin*, the phrase *sui generis* was used in connection to the unique character of the Indians' interest in land and their historical relationship with the Crown.²³⁷ It was argued there is something *more* special about the relationship between Crown and Indigenous peoples than other fiduciary relationships.²³⁸ The rich background of historical dealings between two collective groups is undoubtedly absent from any dealings between solicitor and client, or doctor and patient. The wider function of the doctrine therefore lies in its ability to recognise the unique history of the parties which goes much deeper than the specific dealings. It is the special fact that the specific dealings do not occur in a historical vacuum: they take place in the backdrop of historical dealings. Recognition of this does not betray the context-specific nature of fiduciary law. It is actually faithful to it as it recognises both the specific context *and* the wider context. Thus, it better serves the basic ethos underlying equity of ensuring fairness as it considers more that is relevant to the nature of the immediate relationship. In contrast, the private lens silos the equitable exercise to the specific dealings, and only looks at the private identity of the actors. This is artificial, as it ignores a wider history that influences the immediate context.

3) The Effect

The practical effect of incorporating a wider context into the equitable exercise is that the immediate duty will also be coloured by the broader relationship. Elias CJ's acknowledgement that the Treaty of Waitangi constitutes the Crown's assumption of responsibility towards Māori is an example of the Court taking account of the wider relationship when assessing the specific dealings. Similarly, Toohey J looked at examples of specific legislation and general historical indications to evidence the Crown undertaking to act in the interests of the Merriam Islanders.²³⁹

The effects of this may be felt more heavily in situations with less obvious trust-like facts, where the Crown has not mandatorily imposed itself with a statutory discretion to determine what is in the best interests of the Indigenous party.²⁴⁰ In *Paki*, Harrison J through the private lens, only saw the party's identities in that particular circumstance. Because the Crown was a direct party to the transaction, its identity was seen as a private purchaser. Therefore, the Crown was entitled to act in its own interests and that freedom negated a duty of loyalty.²⁴¹ Elias CJ in *Paki* seemed to draw a distinction between

²³⁷ *Guerin*, above n 11, at 383.

²³⁸ See discussion in Chapter Two "Sui Generis".

²³⁹ *Mabo*, above n 38, at [80] Toohey J refers to the policy of protection underlying the condemnation of purposed purchases of land by settlers.

²⁴⁰ Alex Frame "The Fiduciary Duties of the Crown to Māori: Will the Canadian Remedy Travel? (2005) 13 *Waikato L Rev* 70 at 73. Frame considered this to be a critical fact in *Guerin*.

²⁴¹ *Paki HC*, above n 56, at [125].

general obligations Crown may owe in its dealings with Māori, and duties that may arise in a particular transaction.²⁴² The effect of characterising the Crown-Māori relationship as fiduciary means that it will become part of the “general obligations” dimension that will influence the duty in the particular transaction. Thus, the parties will not just be seen solely as vendor and purchaser, but Māori and Crown. The historical undertakings by Crown to protect Māori through the Treaty and legislation cannot be factored out of the situation.

5. Where to Next?

Both judges in *Guerin* recognised the special role of native title in their analysis, but Elias CJ specifically acknowledged the claim was not one based on native title.²⁴³ Instead, her language referred to “pre-existing property interests of Māori”. This may reflect the Chief Justice’s understanding that the developments in Canada have developed to imply the Crown-Native fiduciary duty does not solely rest on Indian title and surrender as originally stipulated. As Binnie J states in *Wewaykum*: “These dicta should not be read too narrowly. Dickson J spoke of surrender because those were the facts of the *Guerin* case.”²⁴⁴

The same may be said for *Wakatū*, which fulfils the most basic factual requirements recognised by Dickson J as capable of giving rise to a fiduciary relationship: native title in combination of the fact of inalienation except upon surrender. The categorisation of the fiduciary relationships in *Guerin* is “very orthodox” because of the trust-like characteristics of the surrender regime under the Indian Act.²⁴⁵ However, the duty has been recognised on an incremental basis to situations beyond the surrender of native land. Frame’s predictions for situations where the Crown fiduciary duty may arise were both situations which had trust-like, or true trust characteristics.²⁴⁶ But the question remains whether a fiduciary obligation may arise where those characteristics do not exist.

There were three characteristics emphasised in the majority’s judgment: a pre-existing interest, an assumption of responsibility, and a situation of power and dependency. It is not the focus of this dissertation to evaluate whether those requirements should be exhaustive for identifying Crown-fiduciary relationships. It only comments that there is room for expansion and debate.

²⁴² *Paki SC*, above n 84, at [159].

²⁴³ At [344].

²⁴⁴ *Wewaykum*, above n 34, at [98].

²⁴⁵ *Paki SC*, above n 84, at per William Young J at [273].

²⁴⁶ Frame, above n 241, at 83-84.

1) Interest

Elias CJ stressed the “pre-existing and independent property interests” requirement for possibly two purposes. She used it to distinguish political trust situations as done in *Guerin* and *Mabo*.²⁴⁷ This serves a different function to acting as a requirement necessary to attract the protection of fiduciary obligations. Even though Elias CJ in *Paki* expressed a deprecating view that the political trust “denied remedies at law to native people” for protection and considered this to be inconsistent with the doctrine of aboriginal title,²⁴⁸ her Honour chose not to express any view about whether the outcome of the political trust cases would be different today in light of the Canadian cases. However, citing *Wewaykum*, she did acknowledge the Canadian courts have not been rigid in its demand of pre-existing interests. As noted, Binnie J only required the interests to be a cognizable and distinctly Aboriginal one. He did not note whether those interests had to be independent of the Crown.

The dramatic implication of this is that the pre-existing independent interest requirement that was emphasised so heavily in *Guerin* and by Elias CJ is not necessary to trigger fiduciary obligations. Nor is the political trust an obstacle standing in the way to be distinguished from. Instead, the political trust presumption simply disappears, and fiduciary principles may be applicable to non-Indigenous lands. Elliot tried to reconcile Binnie J’s requirements to *Guerin*. He suggested two interpretations to Binnie’s requirement of interests.²⁴⁹ The interest does not need to be pre-existing, only independent. The Wewaikai and Wewaykum bands had no pre-existing property interest, but gained an independent interest from the Crown’s positive actions of informal pre-reserve allocation. The other interpretation views the element of independence as a matter of degree. The strongest possible independent interest is native title, and a weak form of independent interest is an informal pre-reserve interest.

In *Manitoba Metis*, the Indigenous group were the Metis children, the descendants of unions between white traders and Aboriginal women. In exchange for becoming part of Canada, the Crown agreed to grant 1.4 million acres of land to the Metis children and this was subsequently set out in statute.²⁵⁰ The facts failed the *Wewaykum* test because those interests were not distinctly Aboriginal. The Metis held land individually, rather than as a distinct community. This suggests that “Aboriginality” may also be a matter of degree.

Under this test, Māori customary land would most certainly attract fiduciary obligations. Māori freehold land, which has been extinguished of customary title, still arguably has a basis in native title,

²⁴⁷ *Mabo*, above n 38, at per Toohey J.

²⁴⁸ *Paki SC*, above n 84, at footnote 76 per Elias CJ.

²⁴⁹ David E. Elliot “Much Ado About Dittos: Wewaykum and the Fiduciary Obligation of the Crown” (2003) 29 Q.L.J 1 at 29-31

²⁵⁰ Manitoba Act R.S.C 1870 s 31 and s 32.

just like the surrendered interest in *Guerin*. The interest would not be as distinctly aboriginal as customary land but may constitute a weaker indigenous interest. Therefore, following *Wewaykum* does not mean the political trust presumption is completely non-existent to dealings with the Crown, it just means there is a scale involved with determining how forceful that presumption is.

Another way to separate interests is interests involving land, and interests not involving land. Canadian cases have only dealt with land. Where the interest in land is pre-existing and rooted in Indian title, a fiduciary presumption is strongest. Charters states that “Aboriginal title is not the only source of Crown fiduciary duties to Indigenous peoples. Crown fiduciary duties arise equally in relation to Indigenous peoples’ non-territorial rights.”²⁵¹ However her reliance was on *Sparrow*, which used the Crown-fiduciary relationship to interpret the affirmation of “Aboriginal rights” under s 35 Constitution Act. It did not apply *Guerin* directly.

2) Power and dependency

The requirements interrelate as the type of interest involved will inevitably also influence the role the Crown plays and the nature of its relationship. In *Wewaykum*, non-traditional interests pre-reserve creation involved the Crown exercising governmental powers. After reserve creation, where there is a legal interest in the reserve, the Crown’s obligation to regard to the interests of non-Indian parties ceased. In New Zealand, situations concerning customary land will most likely involve the Crown acting in their protective intermediary role, while interests in freehold land will mean the Crown acts at arm’s length like in *Paki*, with no power and dependency. What is clear is that fiduciary obligations will attach to the former. Even William Young J recognised the strict requirements of fiduciary law apply “without undue awkwardness” to the situation of the Crown gaining sovereignty over New Zealand and its radical title being burdened by customary ownership interests.²⁵² What is unclear is when they will attach to the latter.

3) Undertaking

Undertaking has been applied in different ways. There is an undertaking to act in the best interests as required in *Elder Advocates*, and an “undertaking of responsibility or “assumption of responsibility” as required in *Wewaykum*.²⁵³ Ellen France J and Harrison J assessed the

²⁵¹ Claire Charters “Fiduciary Duties to Māori and the Foreshore and Seabed Act 2004: How Does it Compare and What have Māori Lost?” Claire Charters and Andrew Erueti (eds) *Māori Property Rights and the Foreshore and Seabed: the Last Frontier* (Victoria University Press, Wellington, 2007) at 149.

²⁵² *Paki SC*, above n 84, at [281].

²⁵³ Finn, above n 10, at 201. Finn formulated the undertaking test as “simply someone who undertakes to act for or on behalf of another in some particular matter or matters.” See Hoyano, above n 28, at 183 thought this set too low a standard for designating a defendant a fiduciary.

undertaking requirement by looking at specific instruments and seeing if there was an express undertaking. The Chief Justice indicated that the Treaty of Waitangi is a demonstration of an assumption of responsibility by Crown to Māori.²⁵⁴ In relationship to the tenths, the Elias CJ and Arnold and O'Regan JJ did not look exclusively to a specific instrument, but at the cumulation of the Crown's actions towards a specific interest. The difference is an assumption through conduct and an assumption through express words.²⁵⁵ The New Zealand Supreme Court has indicated against an obligation arising only when expressly taken.²⁵⁶ To do so would contradict equity's flexibility by confining its powers and restricting its traditional reach.²⁵⁷

Conclusion

Elias CJ's judgment incorporated Cooke P's pronouncement that it is unattractive to suppose obligations owed by the Crown to the Indigenous people of New Zealand is less onerous than that of Canada.²⁵⁸ The appropriateness of Elias CJ's incorporation depends on whether the Supreme Court has identified the Crown's fiduciary obligations to the same extent as Canada. This chapter presented the *sui generis* framework that Canada used to view Crown-Native situations and argued that it is the most desirable one to adopt. This framework acknowledges a broader basis for the relationship than the immediate facts, and consequently goes beyond implying the public identity of the actors should not prevent a fiduciary duty. Instead, it suggests that the identity and history of Crown and Indigenous peoples is an important factor in imposing the duty. Elias CJ's judgment, much like *Guerin*, is the beginning of this recognition. How far the application of this doctrine expands beyond private-like circumstances may simply be a matter of time.

²⁵⁴ *Wakatū SC*, above n 4, at [380].

²⁵⁵ See Edelman, above n 98, at 25: "The undertaking is construed from manifest words, conduct, and circumstances."

²⁵⁶ *Chirnside v Fay*, above n 22, at [82].

²⁵⁷ *Ibid.*

²⁵⁸ *Wakatū SC*, above n 4, at [390].

Conclusion:

Chapter Four's discussion revealed that the Crown-Māori relationship does not fit so snugly within traditional equitable confines. The Courts are unwilling to stretch the fiduciary duty beyond recognition. This difficulty has prompted commentators and judges alike to ask whether fiduciary language should have a place in this traditionally public context at all, or whether other language better serves to govern the relationship between Māori and Crown.²⁵⁹ Private commentators think the fiduciary jurisdiction has been "hijacked" to provide the conceptual foundation for positive regulation of Crown-Native relations and adjust political claims.²⁶⁰ What is left is a fiduciary analysis in name only. On the other hand, Māori commentators think vague and uncertain substitutionary concepts like "the relational duty of good faith" may not serve Māori interests well.²⁶¹

The *sui generis* duty however, has potential to overcome the challenges by pushing the boundaries of orthodox meanings. This does not leave the fiduciary analysis one by name only. It may simply be a testament to the inherently flexible nature of the fiduciary concept and its faithfulness to the liberal notions of fairness and justice that it can adapt and accommodate itself to a foreign environment.

In Canada, this *sui generis* duty has evolved beyond instances where the facts raise "considerations in the nature of a private law duty".²⁶² It recognises the wider context of the unique and historic nature of the Crown-Aboriginal relationship. Acknowledgement of this in immediate contexts means the Courts are influenced heavily by identity and history of the parties. It is not imposing a fiduciary duty *despite* it. There are hints in Elias CJ's judgment to the same effect, but it does not go as far to suggest that the fiduciary duty in *Wakatū* also has a place in non-trust-like situations.

Chapter Three established that the Treaty of Waitangi has been viewed as the primary source of the Crown's obligations. The cautiousness of some judges to venture beyond situations wider than the specific private dealings may be to avoid the constitutional ramifications that will result from implying that the Treaty of Waitangi is not the only source of the Crown's obligations. The result is that the Treaty will no longer be the only platform used to recognise Māori rights. Elias CJ and Arnold and O'Regan JJ's acceptance of that other platform indicates that just like *Guerin* did with the political trust presumption, the Treaty relationship does not exhaust the potential legal character of the multitude of relationships between the Crown and Māori.

²⁵⁹ *Paki CA*, above n 9, at [104] per Hammond J and McHugh above n 116, at 264.

²⁶⁰ Flannigan, above n 41, at 244. *Paki CA*, above n 9, at [116] per Hammond J. Hammond J also considered that the situation involved is "light years away from the considerations that dictated English chancery jurisprudence so long ago."

²⁶¹ Johnston, above n 7, at 179.

²⁶² *Wewaykum*, above n 34, at [74]. This was also interpreted to be of the same effect by McLachlin CJ in *Elder Advocates*, above n 81, at [40].

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